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No. 6868

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE J. K. MULLEN INVESTMENT COMPANY, a Corporation,
Appellee.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division

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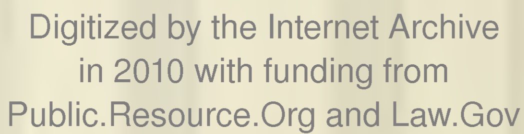
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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

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THE UNITED STATES OF AMERICA,
Appellant,

vs.

THE J. K. MULLEN INVESTMENT COMPANY, a Corporation, *Appellee.*

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

H. E. RAY,
U. S. District Attorney,
Boise, Idaho;

B. E. STOUTEMYER,
Portland, Oregon,
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Gooding, Idaho,
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In the District Court of the United States, for the District of Idaho, Eastern Division

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The J. K. Mullen Investment Company, a Corporation, *Plaintiff,* vs. The United States of America, *Defendant.*	No. 743 Portions of Petition Filed July 24, 1930

* * * * * *

5.

That heretofore and under date of May 2nd, 1916, the said City of American Falls (then Village of American Falls), a municipal corporation of the State of Idaho, duly and regularly enacted its Ordinance No. 70, which was an ordinance of intention to create and establish Local Improvement District No. 9 of said Village of American Falls, for the construction of cement sidewalks and cross walks upon certain portions of the village streets; that thereafter and in regular course, and under date of June 7th, 1916, said Village enacted its Ordinance No. 76, which was an ordinance creating and establishing a Local Improvement District, to be called Local Improvement District No. 9 of said Village, which ordinance described the property to be included in the district and provided for the construction of certain cement sidewalks and cross walks within said

district; that the latter ordinance further provided that the full cost and expense of constructing said sidewalks and improvements should be taxed and assessed upon the property within the district in proportion to the benefit derived from the improvement, and that such assessments should become a lien upon the land and take precedence of all other liens; that in accordance with the terms of such ordinance, the assessments were duly levied upon the lands within said district, and under date of September 6th, 1916, said village duly enacted its ordinance No. 81, which was an ordinance approving and confirming the proceedings had and taken in creating and establishing said Local Improvement District, and in making the assessments for the construction of the improvements, and approving and confirming the assessment roll prepared by the village engineer and the committee on streets, and the assessments levied by virtue thereof, and said ordinance further provided for the payment of such assessments in ten equal installments, deferred payment bearing interest at the rate of 7 per cent per annum; that thereafter and under date of December 14th, 1916, the said City of American Falls (then Village of American Falls), duly and regularly enacted its Ordinance No. 85, which ordinance authorized and provided for the issuance, execution, sale and delivery of Special Assessment Improvement Bonds in the aggregate principal sum of $25,500.00, to provide

for the construction of cement sidewalks and cross walks in and for said Local Improvement District No. 9; that said ordinance prescribed the form and date of the bonds, and the time of the payment thereof, and provided for the levying and collection of special assessments to pay the same in accordance with their tenor.

* * * * * *

9.

That on or about the 1st day of January, 1927, the defendant, under Acts of Congress of the United States, and acting by and through its duly authorized agents of the Department of the Interior of the United States and the United States Reclamation Service, but without any proceedings in eminent domain and without making any compensation whatever to this plaintiff, took absolute, permanent and exclusive possession, title and control of all the hereinafter described portions of the real property within said Local Improvement District No. 9, for a public use and purpose, to-wit, for a reclamation reservoir, which reservoir is commonly known as the American Falls Reservoir, and sold, destroyed or removed all improvements located upon the lots and parcels of land within said improvement district and inundated and permanently flooded the land embraced within said improvement district, and thereby deprived the plaintiff of its said property and totally destroyed plaintiff's said property, and

thereby completely and permanently destroyed plaintiff's one and only method of enforcing the payment of the assessments and bonds aforesaid against the hereinafter described lots within said district, and the improvement thereon; the lots within said Local Improvement District No. 9, so inundated and possessed by the defendant, being particularly described as follows, to-wit:

Lots 1, 2, 3, 4, 5, 6, 7, 8 and 9, Block 3;

West 60 feet of Lots 1 and 2; East 65 feet of Lots 1 and 2; Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28, Block 4;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26, Block 5;

Lots 1, 2, 3, 4, 5, 6, 7, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26, Block 6;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, Block 7;

West 33 feet of Lots 1, 2 and 3; East 92 feet of Lots 1, 2 and 3; Lots 4, 5, 6, 7, 8 and 9, Block 8;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, Block 9;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, Block 10;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, Block 25;

Lots 1, 2, 3, 4, 5, 6, 7, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28, Block 26;

East 192 feet of Lot 1; South 20 feet of Lot 1;

Lots 2, 3, 4, 5; North 72 feet of Lot 6; South 144 feet of Lots 6, 7, 8, 9, 10, 11; West Half of Lots 12 and 13, and East Half of Lots 12 and 13, Block 211;

Tax Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, Block 217;

Lots 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, Block 3;

All of said lots being within said Improvement District No. 9, and in the Original Townsite of American Falls.

* * * * * *

(Title of Court and Cause)

AMENDED PETITION

Filed Oct. 27, 1930

Comes now the plaintiff, The J. K. Mullen Investment Company, a corporation, and as and for its amended petition against said defendant, complains and alleges as follows, to-wit:

1.

That the plaintiff, The J. K. Mullen Investment Company, is a corporation organized and existing under and by virtue of the laws of the State of Colorado, with its principal place of business at Denver, Colorado, and is now, and since the date of its incorporation has been, a citizen and resident of the State of Colorado.

2.

That during all the times hereinafter mentioned, the defendant has been, and now is, The United States of America.

3.

That at all times hereinafter mentioned, the Village, now City, of American Falls, has been, and now is, a municipal corporation of Power County, State of Idaho, and as such City and such Village, has all the powers incident to, and vested in, a municipal corporation of the State of Idaho.

4.

That this action involves a claim against the Government of the United States, for an amount less than $10,000.00, upon an implied contract for compensation.

5.

That heretofore and under date of May 2nd, 1916, the said City of American Falls (then Village of American Falls), a municipal corporation of the State of Idaho, duly and regularly enacted its Ordinance No. 70, which was an ordinance of intention to create and establish Local Improvement District No. 9 of said Village of American Falls, for the construction of cement sidewalks and cross walks upon certain portions of the village streets; that thereafter and in regular course, and under date of June 7th, 1916, said Village enacted its Ordinance No.

76, which was an ordinance creating and establishing a Local Improvement District, to be called Local Improvement District No. 9 of said Village, which ordinance described the property to be included in the district and provided for the construction of certain cement sidewalks and cross walks within said district; that the latter ordinance further provided that the full cost and expense of constructing said sidewalks and improvements should be taxed and assessed upon the property within the district in proportion to the benefit derived from the improvement, and that such assessments should become a lien upon the land and take precedence of all other liens; that in accordance with the terms of such ordinance, the assessments were duly levied upon the lands within said district, and notice of the filing of such assessment roll was thereupon duly published, and under date of September 6, 1916, said Village duly enacted its ordinance No. 81, which was an ordinance approving and confirming the proceedings had and taken in creating and establishing said Local Improvement District, and in making the assessments for the construction of the improvements, and approving and confirming the assessment roll prepared by the village engineer and the committee on streets, and the assessments levied by virtue thereof, and said ordinance further provided for the payment of such assessments in 10 equal installments, deferred payments bearing interest at the rate of

7 per cent per annum; that thereafter and under date of December 9th, 1916, the said City of American Falls (then Village of American Falls), duly and regularly enacted its Ordinance No. 85, which ordinance authorized and provided for the issuance, execution, sale and delivery of Special Assessment Improvement Bonds in the aggregate principal sum of $25,500.00, to provide for the construction of cement sidewalks and cross walks in and for said Local Improvement District No. 9; that said ordinance prescribed the form and date of the bonds, and the time of the payment thereof, and provided for the levying and collection of special assessments, then calculated sufficient to pay the same in accordance with their tenor, but that through mistake or inadvertence the levies and assessments so made and levied were not in fact sufficient to pay the principal and interest on said bonds as the same became due and payable, or at all.

6.

That in accordance with the authority in said Ordinance No. 85 contained, the said Village of American Falls issued, under date of September 1st, 1916, 51 certain Special Assessment Improvement Bonds for said district, numbered consecutively from 1 to 51, both inclusive, each of said bonds being in the principal amount of $500, and being payable on the 1st day of September, 1926, and bearing interest

at the rate of 7 per cent per annum; that said bonds were similar in form, except as to numbers; that bond No. 38 of said series was and is in the following words and figures, to-wit:

UNITED STATES OF AMERICA
STATE OF IDAHO
COUNTY OF POWER

No. 38 $500.00

VILLAGE OF AMERICAN FALLS
Special Assessment Improvement Bond
Local Improvement District No. 9

KNOW ALL MEN BY THESE PRESENTS, That the Village of American Falls, of Power County, Idaho, acknowledges itself to owe and for value received hereby promises to pay to the bearer hereof the principal sum of FIVE HUNDRED DOLLARS on the 1st day of September, A. D. 1926, together with interest on said sum from the date hereof until paid at the rate of seven (7) per centum per annum, payable semi-annually on the 1st days of March and September, respectively, in each year, as evidenced by and upon the presentation and surrender of the interest coupons hereto attached as they severally become due; and both the said interest on and principal of this bond are hereby made payable in lawful money of the United States of America at the National Bank of Commerce, in the City and State of New York, U. S. A., out of the local improvement fund heretofore created for the payment of the costs and expenses of the improvement in Local Improvement District No. 9,

Village of American Falls, and not otherwise.

This bond is issued by said village for the purpose of providing funds for the construction of cement sidewalks in said Local Improvement District No. 9, pursuant to, under, by virtue of and in all respects in full and strict compliance with the constitution and Section 2238 of the Revised Codes of the State of Idaho, as amended by Chapter 81 of the 1911 Session Laws, and Chapter 97, Idaho Session Laws of 1915, and all laws of said state supplementary thereto and amendatory thereof, and an ordinance of the said village passed and approved prior to the issuance of this bond.

And it is hereby certified, recited and warranted that said village is now and for some years past has been a village of said state, and a body politic and corporate, duly organized, existing and operating under and by virtue of the constitution and laws of the State of Idaho, and is now and always has been under the control of a duly organized board of trustees as the duly constituted corporate authority thereof; that all things, acts and conditions required by the constitution and laws of the State of Idaho and the ordinances of said village, to exist and to happen and be done and performed, precedent to and in the creation of the said Local Improvement District No. 9, and the construction of cement sidewalks therein and therefor, and the issuance of this bond in order to constitute the said bond the valid and binding obligation of said village, and payable as aforesaid, do exist

and have happened and been done and performed in regular and due form and time; that the total costs and expenses of said improvements have been duly levied and assessed as special assessments for sidewalks improvements upon all of the lands, lots and pieces and parcels of land in said Local Improvement District No. 9, separately and in addition to all other taxes, and said special assessments are a lien upon said lands, lots and pieces and parcels of land, and take precedence of all other liens; that due provision has been made for the collection of said special assessments, together with interest on unpaid installments at the rate of seven (7) per centum per annum, sufficient to pay the interest accruing hereon promptly when and as the same falls due, and also to discharge the principal hereof at maturity.

In conformity with subdivision 14, Chapter 97 of said Session Laws of 1915, it is hereby recited that 'The holder of any bond issued under the authority of this section, shall be no claim therefor against the city or village by which the same is issued, in any event, except from collection of the special assessment made for the improvement for which said bond was issued, but his remedy, in case of non-payment, shall be confined to the enforcement of such assessments. A copy of this subdivision shall be plainly written, printed or engraved upon the face of each bond so issued.'

This bond is redeemable at the option of said Village after July 1, 1924.

IN TESTIMONY WHEREOF, The Village of American Falls, Power County, Idaho, by its board of trustees, has caused this bond to be signed by the chairman of the board of trustees of said village, countersigned by the village treasurer and attested by the clerk of said village, and sealed with the corporate seal of said village; and each of the twenty interest coupons hereto attached to be signed by the engraved facsimile signatures of said chairman, treasurer and clerk, the 1st day of September, A. D. 1916.

H. C. WONES,
Chairman Board of Trustees.

Countersigned: J. T. DORAN,
(Seal) *Village Treasurer.*

Attest:
O. F. CROWLEY,
Village Clerk.

STATE OF IDAHO,)
COUNTY OF POWER,) ss.
VILLAGE OF AMERICAN FALLS)

I, O. F. CROWLEY, Village Clerk in and for the Village of American Falls, Power County, Idaho, hereby certify that I have recorded the within bond, the said record showing the number and amount of the said bond, and for and to whom the same was issued.

IN WITNESS WHEREOF, I have hereunto set my band and affixed the official seal of said village. O. F. CROWLEY,
(Seal) *Village Clerk."*

7.

That in regular course, before the maturity date of said bonds, one J. K. Mullen purchased and acquired certain of said bonds, to-wit, bonds numbers 38 to 51, both inclusive, paying therefor the full face value of said bonds, and that thereafter and in the regular course of business, and for value, said J. K. Mullen sold, transferred and set over to this plaintiff, The J. K. Mullen Investment Company, a corporation, the bonds aforesaid, and that this plaintiff is now the owner and holder of the same, and has not sold, or transferred or parted with title to said bonds, or either of them, and is now the lawful owner and holder of said fourteen bonds, and each of them; and that no part of said fourteen bonds, or either of them, has been paid, except the interest thereon to December 1st, 1926, and there is now due, owing and unpaid to this plaintiff on account thereof the sum of $7000.00, with interest thereon at the rate of seven per cent per annum from and after December 1st, 1926, and the whole thereof.

8.

That under the terms of said bonds, and under the applicable statutes of the State of Idaho, the only method of enforcing and collecting said bonds was by the levy and collection of special assessments upon the property within said Local Improvement District, which assessments had to be levied and collected in the same manner as provided by law for the

levy and collection of special assessments for such improvements where no bonds were issued, and the said bonds, and the obligation represented thereby, under express provisions of said statutes, became a lien upon the lands within said Local Improvement District, which liens have "precedence of all other liens"; that under the express provisions of the statutes authorizing the making of such assessments and issuance of the foregoing bonds, this plaintiff has no claim on account of said bonds against said Village-City of American Falls, except that said village was obligated to levy and collect the assessments; that the said Village-City of American Falls, from the issuance of said bonds until prevented from so doing by the acts of defendant, as hereinafter alleged, levied special assessments, in accordance with said statutory provisions for the payment of said bonds, and the interest thereon, against the property in said respective districts, which assessments were made and levied in the same manner as provided by law for the levy and collection of special assessments, under said statutory provisions.

9.

That on or about the 1st day of January, 1927, the defendant, under Acts of Congress of the United States, and acting by and through its duly authorized agents of the Department of the Interior of the United States and the United States Reclamation Service, but without any proceedings in eminent do-

main and without making any compensation whatever to this plaintiff, the defendant being well aware and advised that the bonds so held by this plaintiff, and the interest thereon, were outstanding, due and unpaid, and that the assessments levied against the property were insufficient to pay such outstanding bonds, so held by the plaintiff, took absolute, permanent and exclusive possession, title and control of all the hereinafter described portions of the real property within said Local Improvement District No. 9, for a public use and purpose, to-wit, for a reclamation reservoir, which reservoir is commonly known as the American Falls Reservoir, and sold, destroyed or removed all improvements located upon the lots and parcels of land within said improvement district and inundated and permanently flooded the land embraced within said improvement district, and thereby deprived the plaintiff of its said property and totally destroyed plaintiff's said property, and thereby completely and permanently destroyed plaintiff's one and only method of enforcing the payment of the assessments and bonds aforesaid against the hereinafter described lots within said district, and the improvements thereon; the lots within said Local Improvement District No. 9, so inundated and possessed by the defendant, being particularly described as follows, to-wit:

Lots 1, 2, 3, 4, 5, 6, 7, 8 and 9, Block 3;

West 60 feet of Lots 1 and 2; East 65 feet of Lots 1 and 2; Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12,

13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28, Block 4;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26, Block 5;

Lots 1, 2, 3, 4, 5, 6, 7, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26, Block 6;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, Block 7;

West 33 feet of Lots 1, 2 and 3; East 92 feet of Lots 1, 2 and 3; Lots 4, 5, 6, 7, 8 and 9, Block 8;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, Block 9;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, Block 10;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14, Block 25;

Lots 1, 2, 3, 4, 5, 6, 7, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28, Block 26;

East 192 feet of Lot 1; South 20 feet of Lot 1; Lots 2, 3, 4, 5; North 72 feet of Lot 6; South 144 feet of Lot 6, 7, 8, 9, 10, 11; West Half of Lots 12 and 13, and East Half of Lots 12 and 13, Block 211;

Tax Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15, Block 217;

Lots 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21, Block 3;

All of said lots being within said Improvement District No. 9, and in the Original Townsite of American Falls.

and that the property, so taken by the defendant as aforesaid, was at the time of such taking and destruction of a value greatly in excess of plaintiff's said claim.

10.

That the bonds so held and owned by the plaintiff as hereinbefore alleged were and are worth their respective face values, together with accrued and unpaid interest, and by and through the defendant's destruction of plaintiff's property as aforesaid, the defendant has become and is indebted to this plaintiff in the amount of the unpaid assessments outstanding and unpaid against the above described lots so inundated and possessed by the defendant; that the total of the unpaid assessments against the above described lots, so due and unpaid, is the sum of $1,514.23, which sum bears interest at the rate of seven per cent per annum from and after the 3rd day of July, 1928.

WHEREFORE, Plaintiff prays that it have and recover judgment against defendant for the sum of $1,514.23, together with interest thereon at the rate of seven per cent per annum from and after July 3rd, 1928, together with costs of suit and all proper relief.

W. G. BISSELL,
BRANCH BIRD,
Solicitors for Plaintiff.
Address: Gooding, Idaho.

(Duly verified)

(Title of Court and Cause)

DEMURRER TO AMENDED PETITION
Filed Oct. 31, 1930

Comes now the defendant and demurs to the amended petition of the plaintiff herein on the ground:

1. That said amended petition fails to state facts sufficient to constitute a cause of action.

2. That said amended petition shows upon its face that the action is for recovery of an amount of money claimed to be secured by a lien, and that the owner of the property affected by the said lien has never been obligated for the amount claimed by the plaintiff but that the property, only, is subject to payment of the said lien. That the purchaser of property subject to a lien, who has not assumed or agreed to pay the note or bond or other instrument secured by such lien, is not personally liable for the note or bond and may be sued only in a foreclosure action against the property.

3. That the jurisdiction of the court to entertain actions against the United States for the taking of property for public use is limited to cases where the officers of the United States who took the property used by, or for, the United States, acknowledge the plaintiff's ownership thereof at the time of such taking and did not take the same under claim of

ownership in the United States, but that the amended petition wholly fails to show any acknowledgment by the officers of the United States that the plaintiff herein had any title or interest in the lands and other property alleged to have been taken and inundated for reservoir purposes and, by necessary implication, shows that the same were taken under claim of ownership in the United States and that such taking, therefore, cannot give rise to an action against the United States.

4. That the jurisdiction of the court to entertain actions against the United States for damage resulting from the taking of property for public use is limited to cases where the damage was of a kind which was known, intended, expected and foreseen by the government officers at the time of the construction of the governments works, but the amended petition herein wholly fails to show that any damage to plaintiff was foreseen or intended by the government officers.

5. That the amended petition, and particularly that part of paragraph 7 reading

> "and that *thereafter* * * * said J. K. Mullen sold, transferred and set over to this plaintiff * * * the bonds aforesaid",

wholly fails to show that the plaintiff owned any bonds or other property of any kind or had any interest in or lien on any property of any kind whatsoever at the time (on or about January 1, 1927) when the

damage complained of is alleged to have occurred through the flooding of the reservoir lands, and that the law applicable to such cases vests the right to the claim for damages in the party who was the owner of the damaged property, or of some interest therein, at the time the alleged damage occurred. That a subsequent transfer of the damaged property does not carry with it any transfer of the claim for damages, the right to such damage claim remaining in the original owner, the presumption being that the purchaser of damaged property pays only the reduced or depreciated value thereof and suffers no loss, and that such rule is especially strong in cases against the United States because the federal statutes expressly prohibit the assignment or transfer of claims against the United States.

6. And the defendant further demurs to the amended petition of the plaintiff herein for the reason that said amended petition fails to state facts sufficient to constitute a cause of action in that the said amended petition is indefinite and uncertain and insufficient to state a cause of action in the following particulars:

A. That pursuant to Section 3097, Idaho Compiled Statutes, and decisions of the Idaho State Supreme Court construing the same, the lien of State and County taxes takes precedence over liens for special improvement district assessments but that the amended petition fails to allege that the defendant

acquired title to the lots, designated in said amended petition as being within Special Improvement District No. 9, in some manner other than by purchase at tax sale for delinquent State and County taxes.

B. That the amended petition fails to show whether the assessments referred to in paragraph 10 thereof and therein alleged to remain unpaid are original assessments or re-assessments, and when and how the alleged unpaid assessments were made.

C. That the amended petition is indefinite in that it fails to allege the time the plaintiff became the owner of the bonds upon which it bases its action.

D. That the amended petition fails to allege in what manner the United States, by its action in January, 1927, prevented the City of American Falls from levying assessments for the payment of the plaintiff's bounds, which matured on September 1, 1926.

E. That the amended petition fails to show the number, description, and ownership of those lots in said Improvement District No. 9 of American Falls not within the area of said district inundated by the American Falls reservoir.

F. That the amended petition fails to show whether or not said lots within said district, and outside the inundated area, have been sold to meet the assessment for payment of the plaintiff's bonds.

G. That the amended petition fails to allege that there are no other bonds of said district No. 9, in

the hands of others besides the plaintiff, which have not been paid.

H. That the amended petition fails to show the assessments levied against each of the lots numbered therein, the amounts paid thereon, if any, or whether or not any of said lots had the full assessment against the same paid in advance pursuant to Sections 4146 and 4148, Idaho Compiled Statutes.

I. That the amended petition fails to show the value of said lots numbered therein, or any of them. That the United States cannot under any condition be liable on account of any one or all of said lots for any amount in excess of the value thereof.

7. That there is a defect in parties plaintiff in that the plaintiff has not joined with it the owner or owners of those bonds in said district No. 9, not owned by the plaintiff.

8. That said amended petition is ambiguous, unintelligible and uncertain in that paragraph 7 of said amended petition alleges there is due to the plaintiff upon its bonds the sum of $7,000.00, with interest thereon at the rate of seven per cent per annum from and after December 1, 1926, while paragraph 10 of said amended petition alleges that there is due to the plaintiff on said bonds the sum of $1,514.23, with interest at seven per cent per annum from and after July 3, 1928.

9. That the amended petition shows upon its face that the alleged taking of property by the United

States in 1927 could not interfere with any timely, regular or lawful assessment made for the purpose of paying bonds which matured in 1926 and that the assessments claimed to have been interfered with and not paid must refer to a re-assessment made or attempted after 1927 and after the maturity of the bonds, the payment of all original and regular assessments, and the transfer of title to the United States. That the amended petition is insufficient in that it fails to show the existence of any of the facts which are necessary under the state law to authorize such re-assessment and is insufficient in failing to show any lawful authority in the taxing officers of the city or county to create a tax lien on property previously acquired by the United States and on which all liens existing at and prior to the time of purchase have been paid.

H. E. RAY,
B. E. STOUTEMYER,
Attorneys for Defendant.

(Title of Court and Cause)

MOTION TO STRIKE AMENDED PETITION

Filed Oct. 31, 1930

The defendant moves the Court to strike portions of the amended petition of the plaintiff as follows:

From paragraph 10, in the 3rd line thereof, strike the words "together with accrued and unpaid interest";

From paragraph 10, strike the last two lines thereof; and

From the prayer of said petition, strike the words "together with interest thereon at the rate of seven per cent per annum from and after July 3rd, 1928";

for the reason that the above designated parts of said amended petition are irrelevant and improper and contrary to the statute applicable to this class of actions, and in conflict with Section 284 (Judicial Code, Section 177 amended), Title 28, Code of Laws of U. S. A.

And the defendant further moves the Court to strike from paragraph 9 of the amended petition herein the words "but that through mistake or inadvertence the levies and assessments so made and levied were not in fact sufficient to pay the principal and interest on the said bonds", on the ground that the same are irrelevant and immaterial and do not state a cause of action, or any part of a cause of action, in that the statute authorizing re-assessment provides (Sec. 4141, I. C. S.):

> "Whenever for any cause, mistake or inadvertence the amount assessed *shall not be sufficient to pay the costs of the sewerage improvement made and enjoined on the property*", etc.,

and that under the statute the insufficiency of a levy or assessment "to pay the principal and interest on said bonds" is not a ground for re-assessment.

And the defendant further moves the court to strike plaintiff's amended petition from the files for violation of the rules of this court in the filing of said amended petition without permission of the court.

This motion is based upon the said amended petition and upon the provisions of Section 284 (Section 177, Judicial Code as amended), Title 28 of the Code of Laws of the U. S. A., and Section 283 (Section 176, Judicial Code), Title 28 of the Code of Laws of the U. S. A., and Section 4141, I. C. S.

H. E. RAY,
B. E. STOUTEMYER,
Attorneys for Defendant.

(Title of Court and Cause)

MOTION TO REQUIRE PLAINTIFF TO MAKE AMENDED PETITION MORE DEFINITE AND CERTAIN

Filed Oct. 31, 1930

The defendant above named moves the court to require the plaintiff to make its amended petition

more definite and certain in the following particulars, to-wit:

1. That the plaintiff be required to allege in paragraph 9 of said amended petition the manner in which the United States acquired title to the lots mentioned in said amended petition and whether or not the same, or any of them, were acquired through tax sale for the payment of delinquent state and county taxes.

2. That the plaintiff be required to allege in paragraph 7 of its amended petition when the bonds described therein were acquired by the plaintiff.

3. That the plaintiff be required to allege the ownership of the remaining bonds of said district No. 9, mentioned in paragraph 9 of its amended petition, or if plaintiff is the owner of all outstanding and unpaid bonds of said district.

4. That the plaintiff be required to allege the number, description and ownership of those lots of said Improvement District No. 9 not described by paragraph 9 of said amended petition, and whether or not the lien of plaintiff's bonds upon said remaining lots has been foreclosed.

5. That the plaintiff be required to show the assessments levied against the said lots as in paragraph 8 of said amended petition alleged, when said assessments were levied, the number and amounts of such assessments paid, and the number and description of those lots, if any, upon which assess-

ments have been paid in advance as provided for in Sections 4146 and 4148, Idaho Compiled Statutes.

6. That as the plaintiff by paragraph 5 of its amended petition alleges that by Ordinance No. 81 of the City-Village of American Falls there was confirmed all proceedings relative to the levy of assessments upon the lands of the district, including the preparation of the assessment roll and the assessments levied by virtue thereof for the payment thereof in ten equal installments, so that all levies against the lots of said district were necessarily made and presumably collected prior to the maturity of said bonds on September 1, 1926, and by paragraphs 8 and 9 of its amended petition alleges the action of the defendant preventing the City-Village of American Falls from levying special assessments against said lots, which acts are alleged to take place in January, 1927, and by paragraph 10 of said amended petition the plaintiff alleges certain unpaid assessments outstanding and unpaid upon the lots described in paragraph 9 of said amended petition are in the sum of $1,514.23, it is moved that the plaintiff be required to allege in its amended petition whether the assessments outstanding and unpaid, as alleged in paragraph 10, were those assessments levied in 1916, as alleged in paragraph 5, under Ordinance No. 81, or, if said unpaid assessments were levied by said city subsequent to the levy made in 1916, that the date of said levy be alleged and the

ordinance of said city under which such re-assessments were made be supplied.

H. E. RAY,
B. E. STOUTEMYER,
Attorneys for Defendant.

(Title of Court and Cause)

ORDER

Filed Apr. 4, 1931

The demurrer to, and motion to strike, the second amended petition, and motion for a more definite statement, of the defendant, having been submitted, and after consideration of the same,

IT IS ORDERED, That said demurrer and motions be and the same are hereby overruled.

Dated: Boise, Idaho, April 4th, 1931.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

ANSWER TO AMENDED PETITION

Filed May 6, 1931

Comes now the defendant, United States of America, and as its answer to plaintiff's amended petition herein alleges as follows:

1. Defendant denies each and every allegation set out in plaintiff's amended petition herein, except the allegations expressly admitted by this answer.

2. Defendant admits the allegations of paragraphs 1, 2, and 3 of plaintiff's amended petition herein.

3. Replying to paragraph 4 of plaintiff's amended petition herein, the defendant admits that this action involves a claim against the government of the United States for an amount less than $10,000.00, but denies that the same is upon an implied contract for compensation, and alleges the facts to be that there has never been any contract, express or implied, of any kind or sort whatsoever, between the United States and the plaintiff herein.

4. Defendant has no knowledge, information or belief sufficient to enable it to answer the allegations set out in paragraphs 5, 6, and 7 of plaintiff's amended petition herein and therefore denies each and every allegation contained in said paragraphs 5, 6, and 7.

5. Replying to paragraph 8 of the plaintiff's amended petition herein, the defendant denies that under the applicable statute of the State of Idaho, the only method of enforcing and collecting the said bonds was by the levy and collection of special assessments upon the property within said improvement district, and alleges the facts to be that under the terms of the said bonds, and under the applicable statutes of the State of Idaho, the special assessments

for the payment of the cost of the said work and for the payment of the said bonds had already been levied, assessed and apportioned to the various lots, parcels and tracts of land in said improvement district prior to the time that the said bonds were issued and sold, and that the said bonds show upon their face that said opportionment and assessment of the costs of said improvement had already been made at the time the bonds were issued, and that in the event of failure to pay such assessment, the statutes give a remedy by foreclosure of the assessments so referred to. Defendant denies that assessments have to be levied and collected in the same manner as provided by law for the levy and collection of special assessments for such improvements where no bonds were issued. Defendant denies that the said bonds or the obligation represented thereby, under express provisions of said statutes or otherwise, became a lien upon the lands within said sewerage and improvement district, but alleges the facts to be that the assessments so levied and apportioned against the various tracts of land in said district are declared to be a lien but that the bonds themselves are not a lien, and defendant alleges that the costs of the said improvement work were duly assessed and apportioned to the various lots and tracts of land in the said special improvement district and were made payable in ten annual installments, as provided for in Chapter 80 of the Session Laws of Idaho of 1911,

and that under the provisions of subsection 11 of Section 2353 of the Political Codes of Idaho as amended by said Chapter 80 of the Session Laws of 1911, and particularly as set out on page 263, it is provided that

> The owner of any lot or parcel of land charged with any such assessment may redeem the same from all liability for said assessments at any time after said 30 days by paying all the installments of said assessment remaining unpaid and charged against such property at the time of such payment, with interest thereon at the rate of not to exceed eight per cent per annum from the date of issuance to the time of maturity of the last installment;

and defendant alleges that each and every one of the lots and parcels of land included in the said improvement district and within the said American Falls reservoir site was redeemed from the said assessment, so made and levied against the said lands for the payment of the cost of said improvement, by the United States and its predecessors in interest in the ownership of the said property, and that the said assessment and apportionment of costs has been fully paid, but that a portion of the money so paid in to be applied in the retirement of the said bonds and the interest thereon was, after the payment thereof, lost through failure of banks in which said funds were deposited without adequate security or diverted and lost in other ways more fully set out in the defend-

ant's second defense herein. Defendant further denies that the said Village-City of American Falls was obligated to levy and collect any assessments other than those which were levied and collected as aforesaid, and denies that the said Village-City of American Falls was prevented from levying assessments by any act of the defendant.

6. Replying to paragraph 9 of the plaintiff's amended petition, defendant denies that on or about the 1st day of January, 1927, the United States, acting by and through its authorized agents of the Department of the Interior, or at any time or in any manner except the time and in the manner alleged in defendant's second defense herein, took absolute, permanent and exclusive possession of all of the real property within said special improvement district without any proceeding in eminent domain; but alleges that prior to taking possession of said property and using the same for reservoir purposes, the United States acquired title thereto by purchase from the lawful owners of record of said property, and by proceedings in eminent domain, and in connection with said purchases and said proceedings in eminet domain paid or required to be paid all mortgages and liens appearing of record against the said premises, including all the said assessments so apportioned and levied against the said premises for the payment of the cost of the improvement in said special improvement district, and caused each and every

tract of land in said district to be redeemed from said assessments and said liens in the manner provided in the said statute, but that after a portion of said funds so paid by the United States and its predecessors in the ownership of the said lands had been lost through the said bank failures and through the neglect, negligence and misconduct of the city and its officers in depositing said funds in unsafe banks without adequate security and the use of a large part of the funds collected by the city in payment of excess interest incurred on said bonds through the delay and neglect of the city and its officers in failing to apply promptly and properly the funds collected from the lot owners to the retirement of the bonds and the action of the city and its officers in allowing such funds for long periods of time either to remain on deposit in local banks or to be used for other purposes while the bonds continued to draw interest which would have been avoided had said collections been promptly and properly applied to the retirement of the bonds, and after the United States had purchased and paid for the said property and had redeemed or caused the same to be redeemed from the liens of said assessments, the city council of the said Village-City of American Falls attempted to impose upon the United States an obligation to make up the losses resulting from the said carelessness, neglect and misconduct of the officers of the said municipality and other public officers of the

city and county handling the said funds as tax collections, and for such purpose attempted to make a re-assessment upon the lands and property then owned by the United States and acquired in the manner aforesaid, which void re-assessment so attempted by the said city council was the only assessment against the said premises which has not been fully paid; and defendant denies that the defendant ever deprived the plaintiff of its property or destroyed or damaged any property of the plaintiff in any manner whatsoever; and defendant alleges that, to the contrary, the actions of the United States as aforesaid were beneficial to the holders of the bonds of the said municipality and of the said special improvement district in that prior to the time that the United States began the negotiations for and the purchase of the said property, many lot owners in said improvement district had failed and neglected to pay their taxes and assessments and some of said lot owners had abandoned their said lots to tax sale and that by the said action of the United States, as aforesaid, in paying or requiring payment of all said assessments and tax liens on said premises, the amounts which were paid in on said assessments, and which became available for the payment of the bonds and the interest thereon, were larger than would have been collected if the United States had not purchased and taken over said property; that only a portion of the said townsite of American Falls was

so purchased, taken over, and used for reservoir purposes and that in the said portions of said townsite of American Falls which were not so purchased or condemned by the United States for reservoir purposes, many defaults occurred in the payment of taxes and a larger percentage of deficiency in the payment of bonds than in the section purchased by the United States for reservoir purposes as aforesaid.

7. Replying to paragraph 10 of the plaintiff's amended petition herein, defendant has no knowledge as to whether the bonds, if any, held or owned by the plaintiff were and are worth their respective face value with accrued and unpaid interest, and therefore denies the same; and defendant denies that there was any destruction of plaintiff's property by and through the defendant, and denies that the defendant has become or is indebted to the plaintiff in the amount set out in said paragraph 10 of the amended petition, or in any amount or amounts, or at all.

DEFENDANT'S SECOND DEFENSE

As defendant's second and further defense to plaintiff's alleged cause of action herein, defendant alleges:

8. That prior to the taking of any property for use in connection with the said American Falls reservoir, and prior to the flooding and use thereof, the United States acquired title to the same, free

from liens and encumbrances, in part by condemnation but mainly by purchase of said property from the record owners thereof, and paid or caused to be paid all liens of record against the said premises, including the liens for the cost of said improvements in said improvement district so assessed and apportioned against said premises as aforesaid, and caused each and every of the said lots to be redeemed from the said assessment and from the lien thereof and from each and every of the installments in which said assessment was provided to be paid, by payment in full of the said assessments and all installments thereof in the manner authorized and provided under Chapter 80 of the Session Laws of Idaho of 1911, page 263.

9. That a part of the funds so paid and intended for payment of special improvement district bonds, referred to in the petition herein, were lost in the following manner:

(a) That a part of the said money so collected was deposited by the municipal officers having charge thereof, without adequate security, in a local bank and was lost through the failure of said bank.

(b) That several thousand dollars of the funds which should have been applied to the payment of the principal of the said bonds was consumed in the payment of excess interest over and above the amount that should have been required for interest payment, which excess interest was allowed to accumulate on

the outstanding bonds while, through the delay and neglect of the city officers to apply promptly the moneys so collected from the lot owners to the retirement of the special improvement district bonds and the practice of allowing such funds either to remain idle on deposit in local banks or to be used for other purposes or both, the bonds remained outstanding and continued to draw interest.

(c) That by reason of such failure to apply promptly collections to retirement of bonds, the amount of money caught in the bank failure above referred to was largely in excess of the amount that would have been on deposit therein had such collections been promptly applied to retirement of the bonds, and that by reason of such bank failure, the part of the said deposit therein which was finally collected was tied up for a number of years and was unavailable for payment of bonds, so that the bonds which should have been paid remained outstanding and continued to draw interest, while said funds were tied up in the said closed bank, and funds thereafter collected by the city for the payment of said improvement bonds were largely consumed in the payment of excess interest, the interest charges being paid first, and as a result certain bonds having the largest serial numbers remained unpaid.

(d) That in various and sundry other ways, not fully known to the defendant, funds which should have been used on said special improvements or in

the payment of the bonds therefor were lost, dissipated or misapplied.

10. That after the United States had acquired title to the said property in the said reservoir site and had paid for the same, and paid or caused to be paid all liens of record, and had caused said property to be redeemed from the said local improvement district assessments as aforesaid, the city council of the City of American Falls attempted to make up the losses above enumerated by making a re-assessment and attempting to impose upon the United States an additional lien or burden by means of such re-assessment levied and attempted by the said city council after title to the said premises free from liens and encumbrances had vested in the United States, which re-assessment the defandant alleges was void; and that such void assessment, so attempted by the city council after title had passed to the United States, was the only assessment on the said property which has not been paid.

DEFENDANT'S THIRD DEFENSE

As a third separate and additional defense to plaintiff's amended petition herein, defendant repeats and reiterates each and every allegation set out in defendant's second defense herein and makes the same a part of defendant's third defense herein, and alleges:

11. That at the time the United States took pos-

session of the said property in the said American Falls reservoir site and applied the same to public use by the inundation of the same by the waters of the American Falls reservoir, the United States and the officers of the United States in charge of the said project claimed title to all of said property as the property of the United States and took the same under claim of title in the United States and never recognized the plaintiff herein as the owner of the said property or any part or interest therein.

DEFENDANT'S FOURTH DEFENSE

As a fourth separate and additional defense to plaintiff's amended petition herein, defendant reiterates and repeats each and every allegation set out in defendant's second defense herein and makes each and every of said allegations a part of defendant's fourth defense herein, and further alleges:

12. That at the time the said property in the said American Falls reservoir site was taken by the officers of the United States and applied to the said public use in connection with the said American Falls reservoir, it was not foreseen nor intended that the said action of the United States in purchasing, condemning and using said property for said public purpose would or could damage the plaintiff herein, or any of the bondholders of the said improvement district; but, to the contrary, it was expected that the said action of the United States in purchasing

said premises and causing the assessment of liens to be paid in full and the said property to be redeemed therefrom would be beneficial to the holders of the said bonds of said special improvement district, in providing a larger fund for the payment thereof than would otherwise have been available and in avoiding the losses which otherwise might have resulted from the failure of certain lot owners to pay taxes and the abandonment of certain lots to tax sale; and that the said officers of the United States, and all of the officers of the United States in charge of the said project, believed at the time of the purchase and taking of the said property by the United States, and still believe, that the said action of the United States and the said action of the said officers in so taking and using said property would and did prove beneficial to the bondholders.

DEFENDANT'S FIFTH DEFENSE

As a fifth separate and additional defense to plaintiff's amended petition herein, the defendant reiterates and repeats each and every allegation set out in defendant's second defense herein, and further alleges:

13. That defendant is informed and believes, and therefore and on that ground alleges the fact to be that the plaintiff acquired whatever interest, if any, the plaintiff may have in the said bonds claimed by plaintiff after the lands in the said reservoir site had

been acquired by the United States through purchase and condemnation aforesaid and after the same had been applied to the said reservoir purposes.

DEFENDANT'S SIXTH DEFENSE

As a sixth and further defense to plaintiff's amended petition herein, the defendant reiterates and repeats each and every allegation set out in defendant's second defense herein and further alleges:

14. That the United States acquired in the manner aforesaid most of the lands in said special improvement district and most of the lands in the said reservoir site more than five years prior to the date that this action was filed and that for more than five years prior to the date that this action was filed, the United States has held possession of the said lands openly, notoriously and adversely to the plaintiff and to all the world, and that this action is barred by Sections 6596, 6609, 6597, 6617, and 6611 of the Idaho Compiled Statutes and that part of said lands were so acquired by the United States more than six years prior to the filing of this action and that this action is barred under Title 28, Section 41, subsection 20 of the Code of Laws of the United States (Section 24 of the Judicial Code as amended).

DEFENDANT'S SEVENTH DEFENSE

As a seventh and further defense to plaintiff's amended petition herein, the defendant reiterates

and repeats each and every allegation set out in defendant's second defense herein and further alleges:

15. That there is no contract of any kind, express or implied, between the plaintiff and the United States, that the transactions set out and described in said amended petition, and more fully described herein, do not give rise to any actual contract or any contract implied in fact, but that the alleged damage complained of is indirect and based on an alleged duty on the part of the United States to pay taxes or special assessments or re-assessments and that this action is not within the jurisdiction of the court.

WHEREFORE, Defendant prays that the plaintiff take nothing by its complaint herein, and that the defendant have judgment against the plaintiff for its costs in this cause of action.

H. E. RAY,
B. E. STOUTEMYER,
Attorneys for Defendant.

(Duly verified)

(Title of Court and Cause)

FINDINGS OF FACT AND CONCLUSION OF LAW

Filed Jan. 23, 1932

Now on this 2nd day of November, 1931, the above matter came duly on for hearing, plaintiff being

present by W. G. Bissell and Branch Bird, its attorneys; defendant being present by H. E. Ray and B. E. Stoutemyer, its attorneys, whereupon plaintiff introduced its evidence and rested; defendant introduced its evidence and rested; plaintiff introduced its rebuttal evidence and rested, whereupon said cause was by the court taken under advisement, and the court being duly advised in the premises, does now make its findings of fact as follows:

FINDINGS OF FACT

1.

That at the time of, and for many years prior to, the filing of this suit, the J. K. Mullen Investment Company was and is a corporation of the State of Colorado with its principal place of business at Denver, Colorado, and was and is now a citizen and resident of the State of Colorado.

2.

That during all times the defendant is and has been the United States of America, and as such did and performed all of the acts hereinafter set out, acting by and through the agency of the United States Reclamation Service.

3.

That during all the times mentioned in the amended petition herein the Village (City) of American Falls was a municipal corporation of the State of Idaho.

4.

That this action involves a claim against the government of the United States for less than $10,000.00 upon an implied contract.

5.

That heretofore and under date of May 2nd, 1916, the said City of American Falls (then Village of American Falls), a municipal corporation of the State of Idaho, duly and regularly enacted its Ordinance No. 70, which was an ordinance of intention to create and establish Local Improvement District No. 9 of said Village of American Falls, for the construction of cement sidewalks and cross walks upon certain portions of the village streets; that thereafter and in regular course, and on June 7th, 1916, said village enacted its Ordinance No. 76, which was an ordinance creating and establishing a local improvement district, to be called Local Improvement District No. 9 of said village, which ordinance described the property to be included in the district and provided for the construction of certain cement sidewalks and cross walks within said district; that the latter ordinance further provided that the full cost and expense of constructing said sidewalks and improvements should be taxed and assessed upon the property within the district in proportion to the benefit derived from the improvement, and that such assessments should become a lien upon the land and take precedence of all other liens; that in accordance

with the terms of such ordinance, the assessments were duly levied upon the lands within said district, and notice of the filing of such assessment roll was thereupon duly published, and on September 6th, 1916, said village duly enacted its Ordinance No. 81, which was an ordinance approving and confirming the proceedings had and taken in creating and establishing said local improvement district, and in making the assessments for the construction of the improvements, and approving and confirming the assessment roll prepared by the village engineer and the committee on streets, and the assessments levied by virtue thereof, and said ordinance further provided for the payment of such assessments in ten equal installments, deferred payments bearing interest at the rate of seven per cent per annum; that thereafter and on December 9th, 1916, the said City of American Falls (then Village of American Falls) duly and regularly enacted its Ordinance No. 85, which ordinance authorized and provided for the issuance, execution, sale and delivery of special assessment improvement bonds in the aggregate principal sum of $25,500.00, to provide for the construction of cement sidewalks and cross walks in and for said Local Improvement District No. 9; that said ordinance prescribed the form and date of the bonds, and the time of the payment thereof, and provided for the levying and collection of special assessments, then calculated sufficient to pay the same in accord-

ance with their tenor, but that through mistake or inadvertence the levies and assessments so made and levied were not in fact sufficient to pay the principal and interest on said bonds as the same became due and payable, or at all.

6.

That in accordance with the authority in said Ordinance No. 85 contained, the said Village of American Falls issued, on September 1st, 1916, 51 certain special assessment improvement bonds for said district, numbered consecutively from 1 to 51, both inclusive, each of said bonds being in the principal amount of $500, and being payable on the 1st day of September, 1926, and bearing interest at the rate of seven per cent per annum, payable semi-annually; that said bonds were similar in form except as to numbers, and that the form of said bond is set out in paragraph 6 of the petition herein.

7.

That upon the issuance of said bonds, and before maturity thereof, the said J. K. Mullen acquired all of said bonds, paying therefor the full face value thereof, and that afterwards the said J. K. Mullen transferred said bonds to the plaintiff, the J. K. Mullen Investment Company, a corporation, the plaintiff herein, and that said plaintiff is now the owner and holder of said bonds; that no part of said bonds, or either of them, has been paid for, except the

interest thereon until September 1, 1926, and there is now due, owing, and unpaid to the plaintiff on account thereof the sum of $7,000.00, with interest thereon at the rate of seven per cent per annum until the filing of this suit, to-wit, the 26th day of October, 1930.

8.

That all of said bonds are identical in form and substance, except in numbers, and the form of each of said bonds is set out in full in paragraph 6 of the complaint.

9.

That under the terms of said bonds, and under the applicable statutes of the State of Idaho, the only method of enforcing and collecting said bonds was by the levy and collection of special assessment upon the property within said local improvement district, which assessments had to be levied and collected in the same manner as provided by law for the levy and collection of special assessments for such improvements where no bonds were issued, and the said bonds, and the obligation represented thereby, under express provisions of said statutes, became a lien upon the lands within said local improvement district, which liens have "precedence of all other liens"; that under the express provisions of the statutes authorizing the making of such assessments and issuance of the foregoing bonds, this plaintiff has no

claim on account of said bonds against said Village (City) of American Falls, except that said village was obligated to levy and collect the assessments; that the said Village (City) of American Falls, from the issuance of said bonds until prevented from so doing by the acts of defendant, as hereinafter alleged, levied special assessments, in accordance with said statutory provisions for the payment of said bonds, and the interest thereon, against the property in said respective districts, which assessments were made and levied in the same manner as provided by law for the levy and collection of special assessments, under said statutory provisions.

10.

That on or about the 1st day of January, 1927, the defendant, under Acts of Congress of the United States, and acting by and through its duly authorized agents of the Department of the Interior of the United States and the United States Reclamation Service, but without any proceedings in eminent domain and without making any compensation whatever to this plaintiff, the defendant being well aware and advised that the bonds so held by this plaintiff, and the interest thereon, were outstanding, due, and unpaid, and that the assessments levied against the property were insufficient to pay such outstanding bonds, so held by the plaintiff, took absolute, permanent, and exclusive possession, title, and control of all the hereinafter described portions of the real

property within said Local Improvement District No. 9, for a public use and purpose, to-wit: for a reclamation reservoir, which reservoir is commonly known as the American Falls reservoir, and sold, destroyed or removed all improvements located upon the lots and parcels of land within said improvement districts and inundated and permanently flooded the land embraced within said improvement district, and thereby deprived the plaintiff of its said property and totally destroyed plaintiff's said property, and thereby completely and permanently destroyed plaintiff's one and only method of enforcing the payment of the assessments and bonds aforesaid against the hereinafter described lots within said districts, and the improvements thereon; the lots within said Local Improvement District No. 9, so inundated and possessed by the defendant, being particularly described as follows, to-wit:

Lots 1, 2, 3, 4, 5, 6, 7, 8, and 9, Block 3;

West 60 feet of Lots 1 and 2; East 65 feet of Lots 1 and 2; Lots 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28, Block 4;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26, Block 5;

Lots 1, 2, 3, 4, 5, 6, 7, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26, Block 6;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, Block 7;

West 33 feet of Lots 1, 2, and 3; East 92 feet

of Lots 1, 2, and 3; Lots 4, 5, 6, 7, 8, and 9, Block 8;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23, Block 9;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, Block 10;

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, Block 25;

Lots 1, 2, 3, 4, 5, 6, 7, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, and 28, Block 26;

East 192 feet of Lot 1; South 20 feet of Lot 1; Lots 2, 3, 4, 5; North 72 feet of Lot 6; South 144 feet of Lots 6, 7, 8, 9, 10, 11; West Half of Lots 12 and 13, and East Half of Lots 12 and 13, Block 211;

Tax Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15, Block 217;

Lots 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, and 21, Block 3;

All of said lots being within said Improvement District No. 9, and in the Original Townsite of American Falls.

and that the property, so taken by the defendant as aforesaid, was at the time of such taking and destruction of a value greatly in excess of plaintiff's said claim.

11.

That at the time the defendant acquired the title to the various lots, tracts, and parcels of land within said improvement districts, the defendant was aware

that the assessments originally made against the property were insufficient to pay the bonds aforesaid, and the interest thereon in accordance with their terms, tenor, and effect, and for the purpose of protecting the United States against any claim of this plaintiff, withheld a portion of the purchase price agreed upon between the defendant and the respective sellers, which sum so withheld by said defendant for the purpose of protecting the United States against the claim of the plaintiff was approximately $14,000.00, which said sum included moneys withheld for the purpose of paying the amount due on the bonds of districts 1, 2, and 8 of American Falls.

12.

That on the date of the filing of this suit, to-wit, October 26, 1930, there was due and unpaid on account of the bonds of said district No. 9 the sum of $7,267.44; that prior thereto the City of American Falls had received payments made on account of said bonds from the various owners of the tracts, lots, and parcels of land situated within said district, certain sums of money which it had on deposit in the First National Bank of American Falls at the time of its failure, as part of which said sum has been collected from said insolvent bank, and that had said sums of money on deposit in said insolvent bank been applied to the payment of the bonds in district No. 9 in accordance with the terms of said bonds, that the

amount due on October 26, 1930, would have been the sum of $1,595.79 and that the defendant should be credited with such amount; and that after the allowance of such credit, the net amount due the plaintiff on account of said bonds on the 26th day of October, 1930, was and is the sum of $1,595.79.

13.

That the proportion of the area and value of district No. 9 taken by the United States Government for use as a reservoir site and for such purpose was 1514.23/5841.45 part of said district, and that the defendant became and is liable for 1514.23/5841.45 part of the amount due on account of said bonds.

14.

That on the 3rd day of January, 1917, the City of American Falls received a rebate from one Forter in the sum of $2,916.53, which said sum of money should have been applied to the payment of the bonds of said district, and that had said sums so collected by the city been applied to the payment of the bonds of district No. 9 at the time of its receipt, or as soon thereafter as the same could have been applied under the terms of the bonds that the district would have been entitled to credit in the sum of $5,671.65, and that the balance which under such circumstances would have been due on the date of the filing of this suit would have been the sum of $1,595.79, of which sum the proportionate share to be borne by the prop-

erty taken by the defendant, that is to say 1514.23/5841.45, or 25.92 per cent, is $388.48.

15.

That the loss occasioned by the deposit and loss of money in the failed First National Bank of American Falls was the sum of $1,496.86, for which said sum the district was given due credit in finding 12.

16.

That prior to the taking of the property and use as a part of the American Falls reservoir and prior to the flooding thereof, the defendant did not pay or cause to be paid all the liens against said improvement districts, but only paid the amount shown upon the original assessment, and at the time of the paying of the amount shown on the original assessment the defendant was aware that said original assessment through mistake and inadvertence was not sufficient to pay the bonds issued by said district No. 9 as the same became due and payable in accordance with their terms.

17.

That by the terms of the statute authorizing the same and by the terms of the bonds, all sums of money collected on account of said special assessments must be first used and applied to the payment of interest on said bonds; that no money collected for the payment of said bonds was lost through the delay and neglect of the city officials to apply

promptly the moneys collected from the lot owners for the retirement of the bonds, and that the moneys collected by the city, with the exception of the moneys lost by reason of the failure of the bank, were applied to the payment of the bonds in accordance with the statutes of the State of Idaho and the terms of the bonds; that at the time the United States took possession of the property in said American Falls reservoir site and applied the same to a public use, the United States and the officials of the United States in charge of the property took the same as the property of private individuals and at the time of the taking, recognized the rights of the plaintiff and withheld from the private individuals owning said property an amount of money sufficient to discharge the claim of the plaintiff.

18.

That at the time of the taking of said property by the defendant, it was known to the defendant and the officials of the Reclamation Service that the assessment levied in district No. 9 was insufficient to pay and discharge the amount due on the bonds aforesaid of district No. 9, and that the holders of said bonds would be deprived of the proportionate amount due thereon unless the same was paid by the defendant United States, and that at the time of the taking of the property in finding No. 10 set out, the defendant United States, acting by and through the Bureau of Reclamation, withheld from the record owners of

such property heretofore set out an amount sufficient to fully pay and discharge the claim of this plaintiff as against said property.

19.

That the defendant acquired all of the property abcve described in finding No. 10, within the limits of district No. 9, for reservoir purposes only, in some instances by condemnation proceedings, to which the plaintiff or its predecessor in interest was not made a party, but mainly by deeds from the record owners of such tracts at various and divers times between 1920 and January 1, 1927, and that the former record owners thereof retained the right of possession until January 1, 1927, and that the property was taken for a public purpose, that is to say, for reservoir purposes and flooded on or shortly after January 1, 1927.

And the court, after making the findings of fact, does here and now make its conclusions of law:

CONCLUSIONS OF LAW

1.

That the defendant by the taking and flooding of private property, to-wit: the lots, tracts, and parcels of land in finding No. 10 herein set out, the same being a part of district No. 9, for a public purpose, that is to say, for the construction of a storage reservoir, under authority of an Act, or Acts, of the Con-

gress of the United States, impliedly contracted to pay all damages suffered by any and all persons owning or having unpaid liens upon the real estate within said district up to an amount not exceeding the reasonable value of the property taken by it for, and applied to, a public use.

2.

That the plaintiff is entitled to and should recover 1514.23/5841.45, or 25.92 per cent, of the amount due upon and on account of said bonds, and interest, on the 26th day of October, 1930, after a credit of the amount collected by the city and lost in the failure of the First National Bank of American Falls and after the amount collected from Forter is deducted from said amount.

3.

That the statute of limitations began to run on the date of the flooding of the property, that is to say, on or about January 1, 1927, and that said statute is not available as a defense in this case.

4.

That the funds collected by the City of American Falls for the payment of the interest and principal of plaintiff's bonds were not negligently handled by the said city, and that there was no negligence on the part of the city, or its officials, which resulted in material loss to the rights of the defendant.

5.

That the plaintiff is entitled to judgment against the defendant in the sum of $388.48.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

JUDGMENT

Filed Jan. 28, 1932

This cause having come on for hearing in open court on November 2nd, 1931, the plaintiff being represented by W. G. Bissell and Branch Bird, its attorneys, and the defendant being represented by H. E. Ray and B. E. Stoutemyer, its attorneys; and evidence having been submitted, and briefs having been submitted, and the court having made and entered its findings of fact and conclusions of law;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the above named plaintiff have and recover judgment against the said defendant in the sum of $388.48, together with costs to be taxed herein at the sum of $19.50.

Dated at Boise, Idaho, this 28th day of January, 1932.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

ORDER EXTENDING TIME FOR BILL OF EXCEPTIONS

Filed Jan. 14, 1932

Upon motion of the District Attorney and good cause appearing therefor,

IT IS ORDERED That the defendant United States of America be and is hereby given sixty days from date hereof in which to prepare and file a bill of exceptions in the above entitled cases consolidated for trial purposes.

Dated this 14th day of January, A. D. 1932.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

ORDER EXTENDING TIME FOR BILL OF EXCEPTIONS

Filed March 3, 1932

Good cause appearing therefor,

IT IS ORDERED, That the above named defendant, United States of America, be and is hereby given thirty days' extension of time in addition to the extensions hereinbefore granted in these cases for the preparation, service and filing of its proposed bill of exceptions in said cases for appeal purposes.

Dated this 3rd day of March, A. D. 1932.

CHARLES C. CAVANAH,
District Judge.

BILL OF EXCEPTIONS
Filed May 13, 1932

BE IT REMEMBERED, That the above entitled causes having been placed regularly in the calendar of the above entitled court for consolidated trial at a stated term of the above entitled court, begun and holding in Pocatello, Idaho, at the October, 1931, term, to-wit, on the 3rd day of November, 1931, before the Hon. Charles C. Cavanah, District Judge, the issue joined in the above stated causes upon the second amended petition of the plaintiffs and the answer of the defendant thereto in case No. 731, and upon the amended petition of the plaintiffs and the answer of the defendant thereto in case No. 731, and upon the amended petition of the plaintiffs and answer of the defendant thereto in case No. 743, came on to be tried before the said Judge without the intervention of a jury, the action having been brought under the provision of the Act of Congress known as the "Tucker Act", the plaintiff being represented by W. G. Bissell, Esquire, its attorney, and the defendant by H. E. Ray, Esquire, United States Attorney for the District of Idaho, and B. E. Stoutemyer, Esquire, District Counsel of the U. S. Bureau of Reclamation; and upon the trial of those

issues the attorney for the plaintiff offered in evidence certain bonds marked for identification, plaintiff's Exhibits 1, 2, 3, and 4 (see appendix), and offered to prove the ownership thereof in the plaintiffs by calling as a witness Chester Green who, being duly sworn, objection was made to his or any testimony, upon ground as follows:

"MR. STOUTEMYER: Before we proceed with any evidence we wish to object to the introduction of any evidence in either of these cases at this time on the ground that it is apparent on the face of the complaint that neither of these cases are cases based upon contract, express or implied, between the United States and the plaintiff, and therefore are not cases within the jurisdiction of the court as defined by Act of Congress; and for the further reason that it is apparent from the face of the complaint that the allegations therein set out do not contain a cause of action.

THE COURT: I think I passed on that on demurrer. Objection overruled.

MR. RAY: May we have an understanding that all adverse rulings of either party is excepted to?

THE COURT: Yes."

Thereupon witness Green testified as follows:

"I am a district manager of the Inter-Ocean Elevators, which is owned and controlled by the Mullen interests, and I live in Salt Lake City, Utah. I remember the incident of the Village of

American Falls issuing certain improvement district bonds in 1915 and 1916, which bonds were purchased by Mr. J. K. Mullen at my suggestion.

"Q. Since the time of the purchase of those bonds have you been charged with the duty of looking after collecting the bonds?

A. Yes.

MR. STOUTEMYER: I object to this line of testimony and move that the previous answer be stricken upon the ground his information is based upon oral statements as to who purchased the bonds, and is incompetent. If those bonds were purchased the record will show who purchased them. It is not the best evidence.

THE COURT: Objection overruled."

I have been charged with the duty of looking after the collection of these bonds. I am acquainted with the J. K. and Catherine Mullen Benevolent Corporation which was organized in 1925.

"Q. At the time of his organization do you know what if any assets were transferred to the corporation by J. K. and Catherine Mullen?

MR. STOUTEMYER: I object to that as not the best evidence, and incompetent. The transfer was in writing, if there was one.

MR. BISSELL: These bonds were made payable to bearer.

MR. STOUTEMYER: I would like to ask a question in aid of the objection.

THE COURT: Yes.

MR. STOUTEMYER: Did you see any bonds

transferred to Mr. Mullen or to this corporation?

A. I did not see them transferred, no.

MR. STOUTEMYER: We renew our objection to the question as incompetent, and not the best evidence.

THE COURT: What position do you hold in the Oneida Elevator Company?

A. I am the district manager, at Salt Lake City, Utah, at this time.

THE COURT: It is doubtful if that is sufficient to show the transfer of the bonds, or that the bonds are an asset of the corporation."

The defendant thereupon had marked for identification four bonds of $1,000.00 each issued by District No. 1 and marked plaintiff's Exhibit 1; three bonds of $500.00 each and one of $150.00, issued by District No. 2, and marked plaintiff's Exhibit No. 2, and six bonds of $500.00 each, issued by District No. 8, and marked plaintiff's Exhibit No. 3.

Witness Green continued to testify:

I have seen the bonds (plaintiff's Exhibits Nos. 1, 2, and 3) before; they were delivered to me in person by Mr. J. K. Mullen, in Gooding, Idaho. I know who the president of the J. K. and Catherine S. Mullen Benevolent Corporation was; it was Mr. Wetbaugh.

"Q. At the time the assets were delivered to you, as whose property were they delivered?

MR. STOUTEMYER: That is objected to upon the ground no foundation has been laid; no way he could know except by hearsay.

THE COURT: Objection overruled.

MR. BISSELL: Answer the question.

A. What was the question?

(Question read.)

A. There was a memorial endowed, and to aid that Mr. Mullen contributed several million dollars for its assets.

MR. STOUTEMYER: I move that the answer be stricken as incompetent, and immaterial, and not the best evidence.

THE COURT: Motion denied.

Q. And were the bonds you hold in your hand, Exhibits 1 to 3, for the purpose of identification, delivered to you as the property of any corporation?

A. Yes, sir.

MR. STOUTEMYER: That is objected to, and I would like to ask a question in aid of objection.

THE COURT: Yes.

MR. STOUTEMYER: When you say when you were asked whether these were delivered as the property of any corporation, did you have any knowledge as to whose property they were other than what somebody stated to you?

A. The party that purchased the bonds delivered them to me.

MR. STOUTEMYER: Answer the question. Are you basing your answer on what someone else said to you?

A. What somebody said to me? Yes, sir.

MR. STOUTEMYER: That is hearsay and incompetent.

THE COURT: Objection sustained.

Q. Was the party who delivered these bonds to you the party who had organized the plaintiff company and who had contributed its entire capital stock of its organization?

MR. STOUTEMYER: We object to that. The records are the best evidence; also incompetent, irrelevant and immaterial. That is all based on hearsay.

MR. BISSELL: These are not bonds that are required to be transferred in writing. They are bearer bonds.

THE COURT: Were these bonds delivered to you by anyone as to the property of this corporation in question?

A. Yes, sir.

THE COURT: Who delivered them to you?

A. Mr. Mullen.

THE COURT: What did you do with them?

A. I delivered them to Mr. Bissell here.

THE COURT: The company held them ever since the incorporation?

A. Yes, sir.

THE COURT: As the assets of the corporation?

A. Yes.

THE COURT: You know that to be a fact without someone telling you?

A. Yes, sir.

THE COURT: Objection overruled.

MR. STOUTEMYER: May an exception be allowed?

THE COURT: Yes."

Mr. Green continued to testify:

These bonds were first delivered to me at Gooding, Idaho, in 1928.

"Q. Do you know of your own knowledge when J. K. Mullen transferred the property to the J. K. and Catherine S. Mullen Benevolent Corporation?

A. At the time of its organization.

MR. STOUTEMYER: What property? We object to that as the property is not identified. What property do you mean?

MR. BISSELL: This property here.

MR. STOUTEMYER: Those bonds?

MR. BISSELL: Yes.

THE COURT: Objection overruled, if he knows.

Q. And when were they so delivered?

MR. STOUTEMYER: We object to that on the ground that it is based upon hearsay evidence; if he knows. I will ask if he knows, not what someone told him.

THE COURT: Do you understand the question? Do you know, not what someone told you?

Q. (Cont.) To the Benevolent corporation.

A. The president of the company told me that he did. I did not see them transferred. To answer Mr. Stoutmyer's question, I did not see the bonds actually delivered to him.

THE COURT: You know only what the president of the company told you?

A. Yes, sir.

THE COURT: Objection sustained."

Mr. Green continued to testify:

The bonds in question were delivered to you in person, Mr. Bissell, by myself and Mr. J. K. Mullen at Gooding, Idaho.

"MR. BISSELL: As whose property were the bonds delivered to me for collection by yourself and J. K. Mullen in Gooding, Idaho?

MR. STOUTEMYER: We object to that on the ground that the witness has already shown his knowledge is based upon hearsay, what someone told him.

THE COURT: The question is, whose property?

MR. BISSELL: Yes.

MR. BISSELL: May I make an observation, Your Honor?

THE COURT: Yes.

MR. BISSELL: If a certain bond payable to bearer is in the possession of the duly authorized representative of a company and is delivered to an attorney for collection in that capacity that is a prima facie showing of the ownership of the bond, is it not?

THE COURT: Yes.

MR. BISSELL: That is all I was trying to prove by this witness.

MR. STOUTEMYER: In the first place, the record does not show whether this man was a duly authorized officer of the corporation; and in the second place, if the corporation owned the bonds someone else did not own them at all, as shown by this witness, and his knowledge is derived from what someone else told him.

THE COURT: This transfer, you can show that this witness as the agent of the company delivered the bonds to you for collection?

MR. STOUTEMYER: Whether the company owned them or not is objectionable on the ground that his knowledge is what someone told him.

MR. BISSELL: What I am endeavoring to show is that these bonds were delivered to me for collection as the property of that company. The bonds, you will notice, are payable to bearer, and their possession is prima facie evidence of ownership.

THE COURT: This officer apparently is not a defendant.

MR. BISSELL: I am asking what J. K. Mullen did with these bonds.

THE COURT: I think you can show they were delivered by this gentleman, delivered to you. Whether they were the property of the corporation or not is another question. I think you can show what the transaction was. Objection overruled.

(Question read.)

A. The property of the John K. Mullen and Catherine S. Mullen Benevolent Corporation."

Whereupon the plaintiffs offered plaintiff's Exhibits Nos. 1, 2 and 3 and the same were admitted over the objection of the defendant.

Whereupon counsel for the plaintiffs announced they would now take up case No. 743, being the case of the J. K. Mullen Investment Company vs. United States.

Upon direct examination witness Green testified as follows:

> In my capacity as representative of the Mullen interests I had occasion to become familiar with a certain corporation known as the J. K. Mullen Investment Company.

Thereupon fourteen bonds of Local Improvement District No. 9 of the Village of American Falls were marked plaintiffs' Exhibit No. 4 for identification.

Resuming, witness Green testified:

> I have seen those bonds before. They were delivered to me at Gooding, Idaho. Those bonds were delivered by me to you (Mr. Bissell) in the presence of J. K. Mullen.
>
> "Q. And as whose property were they delivered to me for collection?
>
> MR. STOUTEMYER: We object to that on the ground that it is not the best evidence, incompetent, and based on hearsay statements, so far as this witness is concerned, as shown by his previous testimony.
>
> THE COURT: Objection overruled.
>
> MR. BISSELL: I now offer plaintiff's Exhibit No. 4 for identification in evidence.
>
> THE COURT: What is the denomination of those bonds?
>
> MR. BISSELL: Fourteen $500.00 bonds.
>
> MR. RAY: May I ask a question?
>
> THE COURT: Yes.
>
> MR. RAY: I will ask you whether these bonds were delivered to you at the same time the other bonds were delivered?

A. In 1928.

Q. All a part of the same transaction, were delivered to Mr. Bissell at the same time as the others that you described?

A. Yes.

THE COURT: Who delivered these bonds to you?

A. Mr. Mullen.

Q. (By Mr. Bissell) And you were then representing the corporation?

A. Yes, sir.

Q. You were then an officer of that corporation?

A. Yes, I was a member of that company, as its agent.

Q. When they were delivered to you, why did they deliver them to you?

A. I had handled a good many bonds and a good many papers for both that company and the Colorado Grain and Elevator Company for the J. K. Mullen Investment Company in through Southern Idaho and different notes, school bonds and other bonds; that under that condition he usually delivered them to me. I was located at American Falls and Gooding, and he always turned them over to me.

Q. Did he deliver these bonds to you and the other bonds, as testified to, to become the property of this company that you represented?

A. To become the property of this company, yes.

Q. And about when?

A. He told me—

Q. (Int.) You received them as an officer of or as a representative of the company with that understanding?

MR. STOUTEMYER: The witness started to say, 'He told me.'

Q. I asked him if he delivered these bonds to him to become the property of this company.

A. Of the Benevolent Corporation, the Investment Company, yes, were the property of the company, he told me.

Q. You received them as an officer and representative of the company under those conditions, did you?

A. I received them not as an officer of this company, no.

Q. For the Mullen Investment Company?

A. The Gooding Mullen Elevator Company. I was district manager of that at that time, which was a Mullen property, a subsidiary of the Colorado Grain and Elevator Company.

Q. How did they come into the possession of this plaintiff here?

A. Mr. Mullen organized the J. K. Mullen Investment Company as a sort of a holding company for the various interests he was interested in; the Benevolent Corporation he simply organized and transferred the bonds to as a gift to them.

Q. Do you know that to be a fact?

A. That is what he told me."

Mr. Mullen gave those bonds to me personally with my understanding at that time that they were to be the property of that company. All of

these bonds that I have testified to were to be the property of—a part to the Investment Company and a part to the Benevolent Corporation.

"Q. You say 'part of them'?

A. Bonds in Districts 1, 2 and 8 were for the Benevolent Corporation, and in District 9 were for the J. K. Mullen Investment Company.

Q. Case No. 743 is the Investment Company and No. 731 is the Benevolent Corporation?

MR. RAY: We register the same objection to this as we did to the former question, upon the ground that there is not sufficient identification of the property.

MR. STOUTEMYER: In view of the information given by counsel that the delivery was made by Mr. Mullen and not by the president of this corporation or any officer of it, and that the only knowledge that the witness has in regard to the ownership of the bonds was what Mr. Mullen or someone else told the witness, we wish to make the further objection to any further testimony and move to strike out the previous testimony on the ground it is incompetent and not the best evidence, and hearsay.

THE COURT: The bonds in these two suits involved here were delivered to you as the property of these two companies?

A. Yes, sir.

THE COURT: Did you take them and deliver them to Mr. Bissell for collection?

A. Mr. Mullen and myself together.

THE COURT: You two together?

A. Yes.

THE COURT: Objection overruled. Motion to strike denied. Anything further?

MR. STOUTEMYER: In stating that these bonds were delivered to you, part of them as the property of one corporation, and part the property of another, do you base your opinion on what somebody told you? You have no knowledge of it other than what was told to you by someone?

A. No, sir.

* * * * *

Q. The fact is to your personal knowledge that J. K. Mullen was the gentleman who organized the J. K. and Catherine S. Mullen Benevolent Corporation for the purpose of educating orphan boys and endowed it with a great many millions of dollars and that he was practically the sole owner of that corporation?

MR. STOUTEMYER: We object to that.

Q. (Cont.) And that as such he was in possession of these bonds and delivered them to you and me for collection?

MR. STOUTEMYER: I think that who organized this corporation and endowed it, if it was organized and endowed, is a matter of record.

MR. RAY: And immaterial.

THE COURT: Do you object for any other reason?

MR. STOUTEMYER: Also based on hearsay, so far as his knowledge is concerned.

THE COURT: He testified these bonds were delivered by Mr. Mullen and he knows they be-

came the property of these two companies involved in these two suits mentioned in these cases. I understand he has testified that he knew that transaction, what it was, and that they were delivered under those conditions and circumstances, other than what Mr. Mullen told him; that they were delivered to him for collection as the property of the plaintiffs. Do I misunderstand his testimony, that he testified to that?

MR. BISSELL: I think that is just about his testimony.

MR. STOUTEMYER: Also that he testified that his sole knowledge as to that is based upon hearsay, that he said Mullen delivered the bonds. His statement that they were delivered as somebody's property is based solely upon statements made to him.

THE COURT: He has also testified that he is an officer of the company, and the bonds are payable to bearer. Let us get it straightened out. I understand that in these two suits, a certain number of bonds of certain denominations, and so forth; you are familiar with those bonds, is that correct?

A. Yes, sir.

THE COURT: How did you come into possession as an officer of these plaintiffs involved in these two suits, of these bonds?

A. Mr. Mullen delivered them to me.

THE COURT: When he delivered them to you under what circumstances and conditions were they delivered to you and what knowledge

did you derive from him?

A. He delivered me the bonds in Districts 1, 2 and 8 and he said these belong to the Benevolent Corporation; and the bonds in District No. 9 were for the J. K. Mullen Investment Company. He has given me many other papers to collect for the Investment Company, and for the Colorado Grain and Elevator Company, and he wanted me to know which of these companies these bonds were for.

THE COURT: What did you do with them when they were delivered to you?

A. We went up to see Mr. Bissell and turned them over to him.

THE COURT: You were then representing what company?

A. The Gooding Grain and Elevator Company, a subsidiary of the Colorado Grain and Elevator Company, which is a Mullen organization.

THE COURT: You were then connected with the Gooding Elevator Company of Utah?

A. I was district manager of the Gooding Elevator Company.

THE COURT: How did these bonds become the property of these plaintiffs?

A. The property of these plaintiffs?

THE COURT: Yes.

A. Mr. Mullen purchased the bonds originally through the investment company.

THE COURT: The Gooding Investment Company?

A. No, the J. K. Mullen Investment Company,

and then he gave a portion of the bonds to the Benevolent Corporation. In other words, these bonds were purchased away back in 1915, I think, and the Benevolent Corporation was not organized until 1925, so that he did not give them to them until about that time, the time it was organized.

THE COURT: All right, proceed."

Upon examination by Mr. Ray, witness Green testified as follows:

I have never been an officer of the John K. and Catherine S. Mullen Benevolent Corporation or of the J. K. Mullen Investment Company.

"MR. BISSELL: As an employee of the J. K. Mullen system, of which the Oneida Elevator was a part, and the Gooding Elevator Company a part, and the Inter-Ocean Mills a part, from time to time were you delivered notes, bonds and securities for collection and instructed by the company delivering them to you to what subsidiary corporation those things belonged?

MR. STOUTEMYER: We object to that question on the ground it is incompetent, and it has not been shown that this witness was an employee of the Mullen corporations generally, but only by the Gooding Elevator Corporation.

THE COURT: Objection overruled.

A. Yes, sir.

Q. Now what corporations were in the Mullen organization and for whom did you make collections?

MR. STOUTEMYER: That is not the best evidence of what was controlled by Mr. Mullen. There is evidence of record of that fact.

THE COURT: Yes, that goes to the question of identifying the corporations.

MR. BISSELL: Here is the situation we are evidently confronted with, Mr. J. K. Mullen, as the court I think well knows, was interested in many, many corporations throughout Southern Idaho. Among those were the Victory Mills at American Falls, Gooding and Jerome, Twin Falls and Idaho Falls. All of these things were run as separate corporations under a separate name, usually called after the town or county in which they were operating. Therefore, when papers were sent out to their district manager for collection the district manager always was advised as to which particular one of these separate corporate entities this particular piece of paper belonged; that was the practice, and it goes to establish the ownership. That is the only object of this testimony, and I think it is material in order to develop the idea brought out by Your Honor in your question.

THE COURT: Answer the question.

(Question read.)

A. Yes, sir.

Q. And were suits brought on those obligations and in accordance with instructions which you received?

MR. RAY: That is immaterial, Your Honor.

THE COURT: Objection overruled.

A. Yes, sir.

MR. BISSELL: That is all.

MR. STOUTEMYER: We now move to strike all the testimony of this witness on the ground it is hearsay and not the best evidence; that the witness is incompetent to answer the question.

THE COURT: Motion denied.

MR. STOUTEMYER: (Cont.) In respect to the ownership of these bonds and his relationship to these corporations.

THE COURT: Motion to strike denied.

MR. BISSELL: One more question: Mr. Green, calling your attention to Exhibit No. 4, I will ask you to state whether the bonds therein represented are unpaid?

A. Yes, sir.

MR. BISSELL: That is all.

THE COURT: You are excused."

There was no cross-examination of witness Green.

Thereupon, Willard S. Bowen was called as a witness for plaintiff in the case of John K. and Catherine S. Mullen Benevolent Corporation v. United States (case 731) and being first duly sworn, his qualifications as an accountant being conceded, in support of the issue as to whether or not the original assessments made by the City of American Falls to meet and retire the special improvement district bond issue in Improvement Districts Nos. 1, 2, 8 and 9 of the City of American Falls was sufficient for that purpose, testified as follows:

I have made four separate audits of the books of the City of American Falls in respect to the

said improvement districts, one covering a period from 1915 to February 28, 1923; another from that time to October, 1926, which included an audit of the general fund from the time of the original audit of the improvement district funds; a third to May 3, 1927, and a fourth to May 5, 1931, which is in three sections, one of which covers the special improvement district funds and another the general funds. All of these audits are with reference to the funds of Special Improvement Districts 1, 2, 8 and 9 of the City of American Falls (plaintiff's Exhibits 8, 9, 10, 11 and 12—see appendix). Plaintiff's exhibits are carbon copies of my reports to the City of American Falls upon those audits, Exhibit 12 being a report of my general audit ending May 5, 1931.

"MR. STOUTEMYER: We have no objection to the compilation in so far as it is applicable to the issues involved in this case, but we do object to the report upon the ground that there are other matters and statements not admissible; and on the further ground that under the decision of this court the re-assessment is void; the only valid assessment was the original assessment. The only issue involved in these accounts is a question whether the original assessments were paid. And further, that in so far as purporting to apply to the payment of the original assessment, if there is any part of it applying to that, it is also improper and irrelevant and immaterial because that issue has not been raised by the pleadings, the plaintiff hav-

ing never alleged any failure to pay any part of the original assessment, which was the only valid assessment. As I understand it, the allegations of the complaint are that through mistake or inadvertence the original assessment was not sufficiently large and that that was partly responsible for the non-payment of the bonds. A re-assessment is only permissible when through mistake or inadvertence the original assessment was insufficient to pay. This data would only be material for that purpose. The original assessment — the re-assessment was attempted more than two years after the title passed to the United States, and that having been decided to be valid, all of this data and all of these records become immaterial except as to the payment on the original assessment, and that is not material because not alleged it was not paid, and no claim it was not paid.

THE COURT: That now presents the second question. I think I will reserve my ruling on that until the final argument. There might be matters in there that are mere statements of the witness here.

MR. BISSELL: That is a report of audit, and the report of an auditor is always a conclusion.

THE COURT: I will reserve my final ruling on that question as to the admissibility of this evidence.

MR. BISSELL: Subject to that it will be admitted?

THE COURT: Yes, received subject to final ruling."

Whereupon plaintiffs' Exhibit No. 8 was admitted in evidence.

"MR. BISSELL: I now offer that in evidence, the second audit report.

MR. STOUTEMYER: We object to that on the grounds as stated in the former objection.

THE COURT: The same ruling and understanding, and it will be received at this time.

* * * *

Q. Handing you a paper which has been marked plaintiffs' Exhibit No. 10 for identification, in case No. 731, I will ask you if that contains a report which you made for the City of American Falls and the audit just referred to?

A. Yes, that is a carbon copy of the original report that was handed to the officers of the City of American Falls.

MR. BISSELL: That is offered in evidence, dated June 6, 1927.

MR. STOUTEMYER: That is objected to on the grounds stated with reference to the previous offers.

THE COURT: Admitted with the same understanding and reservation of ruling.

* * * * *

MR. BISSELL: I will ask that the report of the audit of June 1st, 1931, as to special improvement funds be marked as Exhibit No. 11 in case 731, and that the report of the general audit of the same date, dated June 1st, 1931, be marked as Exhibit No. 12 in case 731.

MR. STOUTEMYER: That is objected to on the same grounds as to the last three exhibits, and on the additional ground in so far as they relate to the cause of action in this suit was filed previous to that and cannot be used to support a claim for the recovery of compensation, which must be based on the rights that the plaintiff had prior title. That is in addition to the other grounds.

THE COURT: Overruled.

MR. STOUTEMYER: I wish to move in this connection to strike out all of the Exhibits Nos. 8, 9, 10 and 11 as not applicable to the issues as presented by the pleadings and by the decision of this court an attempted re-assessment is not valid.

THE COURT: I will receive this exhibit with the same understanding as the others, that the court will reserve its ruling on the motion to strike. This goes to one of the main questions in the case."

Continuing, witness Bowen testified:

In making the audit referred to and the reports which have been entered in evidence, I had occasion to examine the original assessment made for the purpose of paying the interest and principal of bonds in Districts 1, 2 and 8 as the same became due and payable with reference to and for the purpose of ascertaining whether or not the original assessments as extended were sufficient to pay the principal and interest upon the bonds as they by their terms became due.

"MR. BISSELL: I will offer this photostatic copy of the bond assessments of the City of American Falls. I assume it is correct.

MR. STOUTEMYER: No objection to that.

THE COURT: Admitted.

(Marked plaintiff's Exhibit No. 13 in 731.)"

Continuing, witness Bowen testified:

Plaintiffs' Exhibit No. 13 in case No. 731 appears to be a photostatic copy of the bond assessments for Local Improvement Districts 1, 2, 8 and 9 and one of the books which I examined for the purpose of ascertaining whether the original assessment levies were sufficient to pay the interest on these bonds as the same became due and the principal of the bonds as the same became due according to the terms of the bond.

"Q. As a result of that examination did you determine as a mathematical problem whether or not the assessment as originally assessed is sufficient, as evidenced by that assessment roll, to pay the interest on the bonds and the principal as it became due, in accordance with the terms of the bonds, in District No. 1?

MR. STOUTEMYER: We object to that on the same grounds that were urged to the previous offers.

THE COURT: Objection overruled. Admitted."

Continuing, witness Bowen testified:

From an examination of the original assessment roll it appears that the assessments orig-

inally assessed in said special improvement districts have proven insufficient to pay the principal and interest upon the bonds of those improvement districts in full.

"Q. Did you make a similar calculation as to District No. 2?

A. I did.

Q. From your examination and calculation?

MR. STOUTEMYER: I make the same objection to this question.

THE COURT: Same ruling.

Q. Was it possible for you to determine solely as a mathematical proposition whether the original assessment made was sufficient to pay the interest and principal of the bonds as the same became due?

MR. RAY: I make the special objection to that because it does not cover the estimated cost of construction.

THE COURT: Objection overruled.

Q. Answer the question.

A. It would be possible to show that on No. 2 as well."

The estimate in the bond assessment book as to the principal of the bonds was $1.51 more than the actual bond issue in District No. 2; that is to say, $1.51 more than the principal. As to the interest, that requires another explanation, which also goes back into District No. 1 and may apply there as well. Taking into consideration the denomination of the bonds and the terms of the assessments the estimate was not sufficient to pay the principal and interest in

District No. 2. The result of my calculation as to District No. 8 was the information that the assessment estimated in one district was $14.15 more than enough to pay the principal on the bonds, but the situation as to interest is the same as in Districts Nos. 1 and 2.

"Q. At the time you were engaged in making the audit referred to in the book which you have in your hand as of October, 1926, did you have occasion — did your audit disclose that there would be a balance of bonds in District No. 1, 2 and 8 unpaid?

A. That there would be, or that there was now?

MR. STOUTEMYER: We object to that as not applicable to any issue in this case. You asked whether they are unpaid or not?

MR. BISSELL: Yes, whether any bonds are unpaid.

MR. STOUTEMYER: That is not the best evidence.

THE COURT: Objection overruled.

Q. Answer the question.

A. There are bonds unpaid in all districts."

As an auditor of the city of American Falls, I took up with some officers of the United States Government the matter of these unpaid bonds of Districts Nos. 1, 2 and 8.

"Q. To what representative of the United States Reclamation Service did you make those reports?

A. Mr. F. C. Bohlson.

Q. What position, if any, did Mr. Bohlson oc-

cupy in American Falls at this time, if you know?

MR. STOUTEMYER: We object to that as incompetent, irrelevant and immaterial.

THE COURT: Objection overruled.

A. I am not able to state what position except in a general way.

Q. What was that position in a general way?

A. Well, he was apparently looking after the condemnation details, condemnation of the rights of way.

Q. And arranging for the payment of taxes to the county and apparently handling the accounts in—

MR. STOUTEMYER: (Int.) That is not within the knowledge of this witness.

Q. Do you know if Mr. F. Bohlson was an employee of the United States Reclamation Service at American Falls?

MR. STOUTEMYER: Not in responsible charge; a clerk in the office.

MR. BISSELL: I wondered if there was any real controversy about that.

MR. STOUTEMYER: We are willing to concede that he was a clerk in the office at American Falls, also a clerk in the Reclamation office in American Falls. He will go on the stand.

THE COURT: The objection is well taken.

MR. BISSELL: It is now conceded that Mr. Bohlson was a clerk in the employ of the United States Reclamation Service at American Falls, Idaho?

MR. STOUTEMYER: You have got the record as to that, Mr. Ray?

MR. RAY: That is agreed to.

Q. As auditor of the City of American Falls, did you take the matter of these unpaid bonds up with Mr. Bohlson?

A. I did.

Q. Did you at that time inform Mr. Bohlson as to the amount of bonds due?

MR. STOUTEMYER: We object to this question on the grounds previously stated, incompetent, irrelevant and immaterial.

MR. BISSELL: It is a question whether or not the government acted in good faith in the purchase of those lands if the man in charge of their office had information of the fact that these bonds were due.

MR. STOUTEMYER: The question is whether this man was in charge in such a capacity to bind the government.

THE COURT: The record is not satisfactory on that point.

Objection sustained.

Q. What, if anything, did Mr. Bohlson state as to any provision that had been made for the payment of these bonds?

MR. RAY: That is immaterial, and not binding on the government, no matter what he said.

MR. STOUTEMYER: Also hearsay. You have to show that this man had some authority to bind the government before that evidence is received.

THE COURT: If you make a connection showing this clerk's statements were binding I will allow it.

MR. BISSELL: I want to introduce it for the purpose of showing that a certain amount of money was held out, and if we can then it is competent.

THE COURT: I will allow it in subject to your making that connection. If you don't connect it up I will strike it.

Q. Answer the question."

Continuing, witness Bowen testified:

Mr. Bohlson, a clerk in the office of Construction Engineer Banks, said that there was held in some sort of a fund approximately $13,000.00 for the purpose of paying the assessment that had not been paid on the land that has been purchased. Mr. Bohlson's statement included District No. 9 in case No. 743 of the J. K. Mullen Investment Company v. United States.

Upon cross-examination, witness Bowen continued to testify as follows:

From my report of October 31, 1926 (plaintiff's Exhibit 9), it is shown that the actual collections made by the city exceeded the amount originally assessed on the assessment roll (plaintiff's Exhibit 13), in District No. 1 by approximately $1,871.44; the cause or source of that excess collection was largely, I presume, penalties and interest on delinquent taxes less the collection fee of 1½% paid to the county for han-

dling these tax collections. Many of the lot owners, prior to the time the United States purchased the property, allowed their taxes to become delinquent until the United States purchased, when they paid up not only their assessments but in addition the penalties and interest on delinquent taxes, which accounts for this excess collection. There are similar excess collections in other districts. The amount of such excess collections, as was not lost in the defunct bank, was fully applied to the payment of principal and interest upon these bonds, with the exception of a slight misapplication of $12.00. In theory the original assessments were correctly calculated to pay out the bonds and interest in ten years in annual installments, but, due to the fact that the bonds were not small enough in denomination, even had they had the funds on hand they could not have redeemed them.

"MR. RAY: Why?

A. For instance, on the original issue of No. 1, for $24,000 would pay $2400 a year; the bonds were in denominations of $1000. Each year you could have taken up $2000 worth of bonds, and the first year you would have had $400 of idle money to carry over until next year; the next year you would have had $2400 more, plus the $400, which would have been $2800. You could have taken up $2000 worth of bonds and $800 left over, which was idle money, with which to that extent to resume the interest, according to the original theory.

Q. (By Mr. Stoutemyer) As I understand you

then, the discrepancy or deficiency was due largely to the denominations in which the bonds were issued, and to the fact that the optional date of payment was not so provided as to conform to the date of collections, with the result that the money was held idle in the treasury while interest accumulated on the bonds, is that the situation?"

Witness Bowen continued to testify as follows:

I do not believe the delay in payment of the bonds after the money was collected from the lot owners was the principal cause of the default in the payment of the bonds. There was considerable loss both in principal and interest on the bonds due to the failure of the First National Bank of American Falls in which the city treasurer, after collection of local improvement district assessments, had deposited them; this loss would affect the interest item in that it would have tied up that money so that it could not have been used to redeem the bond principal or the bond coupons, the latter of which would be paid out of the first funds coming in; the principal would be deferred until there were sufficient funds to retire it, all the time drawing interest as the funds tied up in the bank drew no interest while the bonds outstanding continued to accumulate interest. There was considerable delay in the payment in addition to that which resulted from lack of conformity between the denominations of the bonds and the amount of money that came in from time to

time; however, I believe, that was not so serious. Of course the heavy tax collection period—that is the time at which the city would receive its proceeds from the heaviest tax payment—would be well around the first of the year; the interest due on these bonds was due, one on February 1 and another on February 15, as I recall, and two of them March 1, so that it was entirely possible that considerable sums of money might remain idle in the city treasury from the time it had been received from the fall tax collections up to the time it could be applied to the bonds, possibly a period of two months. One of the reasons for the trouble was largely due to the fact that the bonds were in such large denominations that they could not be conveniently paid out of the money as it came in without delay in holding money idle in the treasury. Another reason which contributed to some extent was in issuing the bonds they did not designate a convenient and economical date for the exercise of the option to pay off the bonds. If the assessment roll was made up and the assessments made prior to the time that the bonds were issued and sold as required by statute, and if the bonds had been issued in smaller denominations and with a convenient and economical option payment date, that difficulty would have been avoided. The money that had been collected from the lot owners in these assessments was deposited by the treasurer of American Falls in the bank which failed. There was on deposit by the city treasurer in the First National Bank of Ameri-

can Falls when it failed:

$1168.73 as to Improvement District No. 1				
60.51 " "	"	"	"	2
2155.95 " "	"	"	"	8 and
3031.15 " "	"	"	"	9.

The time elapsing between the time of closing the bank and the time of partial recoveries of deposits was as follows: The bank failed to open on February 7, 1923. The first proceeds of liquidation were paid in October, 1926. The second partial payment of proceeds of liquidation was April 4, 1927, and a still further recovery was made December 6, 1927. A part of the deposit was never paid. The loss of interest during the time these funds were tied up in the bank and until the times of partial payment is one cause for the default on the payment of the bonds as the bonds continued to draw interest at 7% but no interest was paid on these deposits until the partial payments were collected and placed on deposit with another bank at 2% interest.

A substantially greater portion of bonds in District No. 9 (case No. 743) remain outstanding and unpaid than in any of the other districts, and in that district a substantial part of the original assessment has never been paid upon lots outside the reservoir site, which is not true in those districts (Nos. 1, 2 and 8) where the United States purchased all of the lots.

"Q. In one of your reports, Mr. Bowen, you refer to a special deposit which you set up as a collection of a judgment against Sam Forter.

Who was Sam Forter?

A. Sam Forter, as I understand it, was a contractor who let—

MR. BISSELL: I object to the introduction of any evidence concerning the recovery of judgment against Sam Forter as far as Districts 1, 2 and 8 are concerned, that being a cause of action for defective construction of sidewalks, in District No. 9. That is not material here.

THE COURT: Objection sustained, but not as to No. 9.

A. Sam Forter was a contractor who constructed all, or part at least, of the sidewalks in District No. 9."

In addition to the several bond funds in the bank when it closed, there was a special deposit of a balance of an amount recovered from a contractor who constructed the improvements in all or part of Improvement District No. 9. This amount was originally $2916.53 and was paid to the City of American Falls on January 3, 1917. This $2916.53 collected from Sam Forter, the improvement contractor, was not paid upon any part of the bond issue or indebtedness.

"Q. To what extent could the default of the bonds in that district have been reduced had that collection been promptly applied to the reduction of the indebtedness of the sidewalk district instead of held in the special account and used for other purposes?

A. Well, I can best answer that by saying that at the time the First National Bank of American Falls closed, there was $438.75 in that account,

and had that been paid at that time, or before that time—

Q. (Int.) My question is, how much would it have been reduced if the amount of this collection of Forter of $2915.00 been promptly applied to reduce the bonded indebtedness. That was the question.

MR. BISSELL: That is objected to as immaterial. The bonds are in evidence and only payable at a certain time.

THE COURT: Objection sustained to the form of the question."

Continuing, witness Bowen testified on cross-examination:

The books of the city show that the general idea with reference to the payment of these special improvement district bonds was that they ran for 10 years with an option to pay them earlier than that date. Partial payments have been made upon the principal of these bonds here in evidence. A partial payment of $500 was made on bond No. 21 in Improvement District No. 1; a partial payment of $325 on bond No. 38 in District No. 8, and a partial payment of $350 on bond No. 38 in District No. 9.

On re-direct examination, witness Bowen continued to testify as follows:

On collection of the assessments in these special improvement districts, the city ultimately collected approximately $1800 in excess of the amount of the original assessment; the amount

of $1800 is arrived at in this manner: The receipts from the county treasurer, including taxes, penalties and interest, receipts direct from the Reclamation Service and receipts direct from others totaled, and deduct from that the amount set up on the tax rolls as the original estimate for principal and interest. The source of the excess payment was interest and penalties and to some extent it offset the extra interest which accrued on the bonds by reason of their not being paid promptly.

In one of my reports (plaintiff's Exhibit No. 9) I refer to a special deposit set up as a collection of a judgment against Sam Forter who, as I understand it, was a contractor who constructed all or a part of the sidewalks in District No. 9. The amount of this judgment, $2916.53, was paid to the city by Sam Forter and placed in this special fund on January 3, 1917. This fund was carried until disbursed in part as follows:

O. R. Baum, for services..........$600.00
O. F. Crowley, for services........ 150.00
American Falls Press, printing and
publication.....................1486.80
R. J. Newell, for labor............ 37.00,

leaving a balance in April, 1917, of $642.75. At the time the bank closed, there was a balance in the fund of $438.75. The difference between that and the $642.75 which existed in April, 1917, we were required to estimate inasmuch as it could not be directly explained, a fund of some $200.00. At the time this money was re-

ceived by the city, on April 14, 1917, there were not at that time any bonds due and payable because a year had not elapsed since the issuance of the bonds. It would have been possible at that time to have immediately applied that money to the payment of interest or principal on these bonds, but not according to the set-up or the terms of the bonds. I cannot tell just the amount of money that Districts 1, 2, and 8 lost by reason of loss of interest and of principal from the failure of the First National Bank of American Falls; the amount of money that is still unavailable by reason of the bank failure is—

for sewer district No. 1	$131.25;
" " " No. 2	6.79
in sidewalk district No. 8	242.12
or a total of	$380.16

computed to April, 1931. The net loss from the same cause in District No. 9 is $340.42, and in the special fund $49.28.

The difference between the principal of the bond issues of the improvement districts and the amount set up for principal on the assessment roll is as follows:

	Principal of bonds	On assessment rolls
District No. 1	$24,000.00	$23,638.04
" " 2	7,150.00	7,151.51
" " 8	21,506.05	22,040.20
" " 9	25,219.25	25,216.78

There was no additional amount set up of 1½% to pay for the collection of the principal;

that is the fee which I think the statute allows the county for collection.

On recross-examination, witness Bowen continued to testify as follows:

I did not make any calculations as to the amount of interest lost by reason of the bank failure but I know in a general way that there were a number of years when the money was tied up and no interest payment received. In making the set-up upon the assessment roll on account of the several improvement districts, there was no sum set up for payment of the first year's interest on the bonds of District No. 1; and in Districts 2, 8 and 9, this item was not originally set up but was set up in the second year in addition to the first year's interest. This fact naturally started the payment of interest and principal off upon an incorrect basis and required the city to use money received for the principal each year for the payment of interest.

"Q. And then would you say from an examination of your books and the set-up for interest and assessment that the manner of making the assessments and the mistake contained therein was responsible for the fact that the interest and principal of the bonds were not paid as the same matured, according to their terms?

A. That was very largely responsible.

Q. That is practically responsible, is it not, which really caused this condition?

Mr. BISSELL: We object to that as immate-

rial, calling for a conclusion, and hearsay.

THE COURT: Objection sustained as leading."

Continuing, witness Bowen testified as follows:

The penalty received in collection of delinquent taxes will not offset the accumulated interest on the bonds; the rate of penalty was 6% part of the time and 2% part of the time.

"Q. What do you mean by two per cent?

A. On the whole amount of taxes.

Q. There is no penalty on delinquent taxes as low as two per cent, is there?

MR. BISSELL: I object to that as calling for a conclusion and immaterial.

THE COURT: Objection sustained."

Whereupon, the plaintiff to support the issues made herein—that an attempt had been made to re-assess the property within the special improvement districts but had been prevented from so doing by action of the defendant United States in taking title to the property within said improvement districts, thereby rendering said property tax exempt—produced as a witness T. H. Davie, who being duly sworn, testified as follows:

I am the city clerk of American Falls and in custody of the ordinance book of that city. I have here original Ordinances Nos. 122 to 125 and also copies thereof. (Whereupon the copies were offered as substitutes for the originals, and marked plaintiff's Exhibit 16—see appendix.)

"MR. BISSELL: I offer them in evidence and offer to substitute in lieu thereof a copy of the American Falls Press, which was the official newspaper of the City of American Falls, which has each of the ordinances printed verbatim and in full.

MR. STOUTEMYER: We object to that on the ground it has not been shown that the United States acquired title and that the attempted reassessment was void and already discharged in this case, and therefore immaterial.

THE COURT: You do not object on the ground that they are not ordinances of the city, and passed by the city?

MR. STOUTEMYER: No.

THE COURT: Objection overruled."

Witness Davie resuming, testified as follows:

I was the owner of property in American Falls and in the reservoir site, and sold my property by contract to the United States about 1925. At the time of settlement someone in the Reclamation office, now unknown to me, explained the purpose of withholding a sum of money from the purchase price.

"Q. At the time you made settlement with the Government, did the party having charge there of the paying out of money, explain to you why a certain sum of money was being withheld from you?

A. Yes.

Q. What explanation did he give?

MR. STOUTEMYER: We object to this; it

has not been shown that any such statement was made by any one who had any authority to bind the Government.

THE COURT: Let him state who it was, if he can.

Q. Do you remember which one of those three gentlemen it was?

A. No, I do not.

THE COURT: Are you clear that it was one of those three gentlemen named?

A. I know it was a gentleman in the reclamation office.

Q. And who were in there in charge of that work, if you remember?

A. Mr. Banks, Mr. Bickel and Mr. Bohlson. I think there was also Mr. Anderson. He was in there at that time; he was a clerk of some kind.

Q. Mr. Anderson have anything to do with buying the property?

A. No.

Q. Was the gentleman with whom you settled one of the three whom you have named?

A. Yes.

THE COURT: Objection overruled. Answer the question."

Witness Davie continued to testify:

It was my understanding that it was withheld to take up the unpaid assessments upon the property.

On cross-examination, witness Davie continued to testify:

This money which was withheld was eventually paid over to me some two or three years later. I think I understood that this money was withheld temporarily.

Whereupon T. C. Sparks was introduced as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

I am an abstracter by occupation, have handled some real estimate transactions and am at present mayor of American Falls. I have also been on the city council from 1919 to 1921 and from 1923 to 1927; I was a property owner in the old town of American Falls at a time when the United States Reclamation Service was constructing the American Falls Dam. During that time F. A. Banks was the engineer in charge and he had assistants in the office during that period, a Mr. Bickel and a Mr. Bohlson, and Mr. E. P. Anderson. As an official of the city and as a property owner, I talked with Mr. Banks and the several men in his office regarding the question of payment of these improvement district bonds. When settlement was made for my property, there was an amount held up to cover contingencies arising in case there was not enough money from these sidewalk and sewer assessments to retire the bonds; this was in addition to the amount held back for the payment of current taxes, a mortgage and the payment of the balance of the ten annual assessments on my sewer and sidewalk.

"Q. Was there an amount of money held up

from you as an individual and property owner by the government for the purpose of retiring these sidewalk and sewer bonds?

MR. RAY: That calls for the conclusion of this witness.

MR. BISSELL: It calls for a fact.

THE COURT: He can state whether that was a fact or not. Overruled."

Resuming, witness Sparks testified:

There was an amount of money held up for that purpose. I had occasion to have personal knowledge as to whether or not the government was holding out similar sums of money from other sources and it was commonly known around town that a portion of the money due each property holder in the district was withheld by the government for that purpose.

"Q. How long did the government retain this money which they held out on you, telling you that it was for the purpose of paying these bonds?

MR. RAY: I don't know that they ever told him that in the testimony.

THE COURT: Yes, I think so. Did you say that?

A. Yes. For the purpose of paying the bonds.

THE COURT: Overruled."

Resuming, witness Sparks testified:

I could not say exactly in my case how long the money was held out but it seems to me it was between 18 months and 3 years. The old townsite of American Falls was not all flooded at

once; portions of American Falls in special improvement districts 1, 2 and 8, I would say, were flooded late in the fall of 1925 or winter of 1925 and spring of 1926 as the water rose during storage. I think the Grand Hotel, as I recall, was the last building to be moved in the later winter of 1925 or perhaps in the spring of 1926; my house was about the fifth house left on the townsite and I moved it off in April, 1925, and between that date and the time of the removal of the Grand Hotel was the period of removing the balance of the buildings.

On cross-examination, witness Sparks continued to testify as follows:

The lands purchased by the Government for reservoir purposes were partly secured by purchase and partly by condemnation. I believe there were two different kinds of standard form of land-purchase contract used. Defendant's Exhibit 1 is one of the forms used (Defendant's Exhibit 1 admitted in evidence without objection—See Appendix). Paragraph 7 of Defendant's Exhibit 1 provides that the government may deduct from the purchase price the amount of valid liens. Some deductions were made in purchases about the year 1923; the reassessment was not made until 1928, when there was talk about the setup not being sufficient and about a reassessment. The amount of these temporary suspensions were returned without comment to the land owners; I know they were returned and that under the terms of paragraph 7 of the

contract (Defenedant's Exhibit 1) such deductions could legally be made.

On redirect examination, witness Sparks proceeded to testify as follows:

Paragraph 7 of the contract (defendant's exhibit 1) provides that the Government may withhold the money for any liens or encumbrances existing against the property; I would not say the government withheld sufficient money to discharge these bonds in all instances but in a very great number of them. I do not know who eventually decided the question as to whether or not these bonds were liens.

Recalled, and resuming as a witness for the plaintiff, witness Sparks testified:

As an abstracter I have prepared at your request a list of the lots in Improvement District No. 9, which have been taken over by the government, together with an abstract of the reassessments reassessed against said lots under the reassessment ordinance; that is the paper marked Plaintiff's Exhibit No. 4 in case No. 743.

"MR. BISSELL: I offer this, which is certified by the abstracter, and made as such, showing the property taken over and inundated in district No. 9, together with the amount of the reassessment under the ordinance.

MR. STOUTEMYER: I do not object on the ground it is a copy, but we do object on the ground it is incompetent, irrelevant and immaterial, for a number of reasons, and including

the fact that the attempted reassessment occurred a number of years after the Government purchased the property and is void for all purposes; for the further reason there is an entire lack of showing of the necessary facts under the state statute to authorize a reassessment placed against privately owned property.

THE COURT: Objection overruled.

MR. BISSELL: Exhibit No. 4 in case 743."

Resuming, witness Sparks testified:

I am familiar with the boundaries of improvement districts 1, 2 and 8. All of district 1 and all of district 8 and most of district 2 were inundated by the building of American Falls dam and reservoir. A small portion of the high land which borders the water line of the reservoir in district No. 2 was not inundated; I have been an abstracter for 16 years in American Falls and while not engaged in the general real estate business, I have handled property for non-residents on some occasions; I have become acquainted with the value and location of various properties in American Falls and in my opinion the un-inundated portion of district No. 2 would be worthless for residence or business purposes.

No cross-examination.

O. F. Crowley, being called as a witness on behalf of the plaintiff, and being duly sworn, testified:

I reside in American Falls and have been City Treasurer since 1923 or 1924. I recall the circumstances of building the American Falls Dam

and prior to that time I was a property owner within the reservoir site. I am acquainted with Mr. Banks, the project engineer, and Mr. Bohlson, clerk, and Mr. Bickel, who were in charge of building the dam and acquiring the right of way. In dealing with them for the sale of my property there was a sum of money withheld from the purchase price when settlement was made and paid over to me about two years later. It was explained to me why the money was being withheld by whom, I don't remember, but I think it was Mr. Bickel who was one of the men in charge of the dam and with Mr. Bohlson who had to do with securing the right of way.

"Q. Did the party withholding, or with whom you were settling on behalf of the Government, then and there state why the money was withheld.

A. They did.

MR. STOUTEMYER: We object to that; there is no showing that the person he talked with had any authority to bind the Government.

THE COURT: Can't you state with whom you were dealing with there in your own transaction, what it was and what was done? Three men were there, you say?

A. Your Honor, I know what was done, but the reclamation people were frequently in my office on tax matters and different things, and it is hard for me to recall any individual transaction.

Q. With any one of those three men?

MR. STOUTEMYER: You are now testify-

ing as to your own piece of property, you say? Do you know whom you dealt with?

A. I think it was Mr. Bickel. I would not swear to that.

THE COURT: You will not make that statement; you will not swear to that?

A. I would say I think it was Mr. Bickel that the statement was made by, but it is quite a while ago.

THE COURT: Who was he?

A. One of the reclamation officials who had charge of the construction of the dam.

MR. STOUTEMYER: Was he one of the men in charge of the dam?

A. He was one of the men in charge of the dam, yes.

THE COURT: What else did he do; did he have anything to do with securing the rights of way there?

A. I think that he had to do with the securing of the right of way, if I am not mistaken, he and Mr. Bohlson.

THE COURT: Go ahead."

Resuming, witness Crowley testified as follows:

I was told that an amount sufficient to take up the delinquent payment on the sewer and sidewalk districts was withheld and in addition an amount to take up any deficiencies that might arise, such as delinquent bonds or bonds which were not paid.

On cross-examination, witness Crowley testified:

I believe my contract with the government

provided that money might be deducted from the purchase price in the amount of valid liens. I agreed to convey clear title free from liens and incumbrances for a specified amount. A reassessment was proposed in district No. 9 in 1928, but I don't know of any attempted or proposed reassessment in the other districts. When it was ultimately decided that the reassessment was not a lien, I think the money was paid to all the property owners; I suppose you would call the withholding of money a temporary suspension at the time, pending a decision.

On redirect examination, witness Crowley testified:

I think I made a contract with the government in 1924 and that the repayment was made somewhere along two or three years later.

In response to questions by the court, witness Crowley testified:

I am familiar with the area covered by these various special districts here involved in the bonds. The entire area was not covered by water under the reservoir. A large portion of No. 9 was not covered and I think a portion of sewer district No. 2 is not uniformly covered, but all that portion of the town, or the lower part of it, was not covered as I recall it, not flooded.

"THE COURT: I assume before the case is closed you will explain to the court what districts are included in this reservoir site.

MR. BISSELL: I think the pleadings allege

that districts 1, 2 and 8 are inundated and that is admitted by the answer and a portion only of district No. 9. It is plead that 1, 2 and 8 are totally inundated and it is admitted.

MR. STOUTEMYER: That is not correct. We bought all of those portions of 1, 2 and 8 but did not flood them."

On recross-examination, witness Crowley testified as follows:

As City Treasurer, I am familiar with the assessment book or assessment roll, a photostatic copy of which is in evidence (Plaintiff's Exhibit 13). The marks upon the assessment book opposite certain lots, "Assessment paid", with no assessment carried out thereafter represent the assessments paid; the levy for sidewalk being paid at the time the sidewalk was constructed. I would say that the fact that assessments were paid in full upon some of the lots, when the improvement was built accounts for the discrepancy between the total for the ten years' assessments and the total amount of the bonds.

Upon redirect examination, witness Crowley testified as follows:

All of districts 1 and 8 were inundated by the reservoir of American Falls, and I think there was a very small portion of district No. 2 that was above the water line; I could not say the acreage but just a slight point that ran down into the lake.

Whereupon plaintiffs announced that they rest, and the defendant then and there moved the court for a non-suit as and upon grounds as hereinafter set forth; and the said Judge then and there denied said motion. Thereupon the counsel for said defendant excepted to the ruling of the court as is made to appear more particularly hereinafter.

Whereupon, in order to controvert the issue that there was an implied contract between the plaintiffs and the United States and the issue as to whether plaintiffs' complaint was filed within six years of the time that the United States took title to the property in the improvement districts where the cause of action, if any, arose, Mr. F. A. Banks was called in behalf of the defendant, and being duly sworn, testified as follows:

> I am a construction engineer of the United States Bureau of Reclamation and in that capacity was in charge of the construction of the American Falls Dam and took possession of the city lots purchased by the United States. I took possession of the first piece of land in 1920 or early in the spring of 1921 and the balance of the lots required for reservoir site were acquired by the defendant the United States by purchase and condemnation between that time and the year 1926 when the dam was completed and some water stored behind the same. The lands in the improvement districts involved in this case were only partially flooded in 1926, but the reservoir was not filled until 1927.

"Q. At the time that you took possession of this property in the name of the United States for reservoir purposes, did you claim title as the title of the United States?

A. I did.

MR. BISSELL: I object to that as incompetent, irrelevant and immaterial. He may state what the facts are.

THE COURT: Objection sustained.

MR. STOUTEMYER: We offer to prove by this witness that the time this property was taken by the Government, for instance, it was taken under a claim that the United States was the owner and had title thereto. The United States did in fact have such title, and this witness never recognized the bondholders as the owner or having any interest in that property at the time it was taken for the Government of the United States.

THE COURT: Objection sustained. Go ahead.

Q. Did you take this property as the property of the United States?

A. Yes, sir.

Q. Did you do so prior to the time it was flooded?

A. Prior.

Q. Did you recognize the bondholders as the owners thereof or any interest therein?

A. No, sir.

MR. BISSELL: I object to that and move to have the answer stricken. I object to it as immaterial.

THE COURT: Objection sustained."

Resuming, witness Banks testified:

At the time of taking possession of those lots as engineer in charge of construction, I claimed title to said property as the title of the United States prior to the time it was flooded, and did not recognize the bondholders of special improvement district bonds as the owners of said lots or of any interest therein.

I have never stated that the United States withheld from the purchase price due to lot owners any money for payment of bonds, nor have any of my subordinates been authorized to make any such statement, or made any such in my presence. There was no money withheld from the purchase price due vendors or lot owners for the payment of any bonds. On some of the lot purchase transactions a sum of money was withheld from said lot vendors, temporarily, pending my receipt of a legal opinion as to whether or not a proposed reassessment against lots within said improvement districts would constitute such a valid lien which our land purchase contracts authorized us to pay and deduct from the purchase price. The money temporarily suspended was paid to the land owners.

"Q. Was that after an opinion had been rendered that the reassessment was not a valid lien?

MR. BISSELL: I object to that as immaterial for the reason there is no showing here that anybody in authority or any court ever rendered such an opinion?

THE COURT: Objection sustained."

Resuming, witness Banks testified as follows:

There was a provision in the contract that permitted the withholding of the amount of liens from the purchase price and that liens could be retired by either the record owners or the Government. There was no provision under which anything could be withheld unless there was a valid lien.

On cross-examination, witness Banks testified:

Most all of the contracts of purchase were taken in my name. I began to make those contracts for the purchase of property down there as early as 1920, and I think there was a large number of the contracts executed in 1920. As early as 1920 the government, acting through me or under my direction under the provisions of section 7 of the contract, did not hold out an amount of money sufficient to pay these special improvement district bonds. In the first contracts there was held out enough to pay the liens of record and in the later contracts there was enough held out to meet any reassessment that might be made on account of any liens. This money was retained by the government to pay any valid liens of any kind that might be established. I could not say as to whether or not there was a part of that money held out from the dates of the respective contracts of purchase. The moneys were not held out until the voucher was paid, which was some time after the contracts were executed. Any time the United States government was paying for a piece of property

purchased after the year 1925, we held out an amount of money sufficient to pay off any valid reassessment that might be made. I think that the government retained the sum of from $13,-000 to $14,000 until some time in 1929 before they paid it to the land owners; it was withheld for the purpose of paying any reassessments that might be held valid liens. When the United States took the property over, it was done by purchase from the individual citizen. When we took it over we asserted it was the property of the United States by reason of purchase from the individual citizen. There was some of the property in the city of American Falls within the reservoir in improvement districts 1, 2, 8 and 9 condemned. There is a record of it. I think there was a condemnation suit against John Kosanke under the dam proper. There was quite a number, perhaps 12 or 14 pieces acquired by condemnation under the dam proper, that was to be covered by the dam. At the time I was making the purchase of only a part of the lots, I had knowledge of the fact that these improvement district bonds were outstanding and unpaid. I heard that this was true with respect to some of the lots.

F. C. Bohlson, a witness produced by and on behalf of the defendant, being first duly sworn, testified as follows:

I was employed in connection with the American Falls project in a capacity to negotiate the purchase of property for the right of way of the

American Falls dam and reservoir and to see that payments were made. My official position was that of clerk. I do not know of ever having stated that any of the money withheld was being withheld for the purpose of paying bonds.

On cross-examination, witness Bohlson testified:

I presume that I gave out checks to settle with the various owners of land for their property. In some cases there was a certain sum of money deducted from each check but not in all cases. The purpose of deducting the money from each check was to protect the United States against the possibility of other assessments in the various improvement districts. One could not tell whether the sum withheld was sufficient or not for that purpose, but we held out an amount from each property owner that was estimated to be sufficient to retire any assessments against the property that might be levied in the future, on account of the existing bonds. This was not necessarily explained to each and every lot owner. The vouchers that the lot owners signed gave the details of that quite extensively to most of them. The vouchers that the land owners signed specified the amount of money withheld and what it was for. I do not have any of these vouchers in my possession. I think the money that was held out was more for the purpose of protecting the United States against any claim that the city of American Falls might have. Personally I don't know that the bondholders had anything to do with it. That never was put into

any of the abstracts of title. I knew that there were outstanding bonds and while I did not discuss it with all of the members of the reclamation force, I know some at least knew that there were outstanding bonds. I presume I discussed it with Mr. Banks and very likely with Mr. Bickel. All of the representatives of the government that had anything to do with the acquiring of title knew that these bonds were outstanding along some time after the reports to that effect got out that the bonds were not all being retired. Prior to that we did not know that. I knew that after 1925. I could not say that the bulk of the purchases were after 1925 but we started in 1920 and got through in about 1926. Sometimes we were more active than at other times. Somewhere between $10,000 and $15,000 was held out by the government.

On redirect examination, witness Bohlson testified:

This money was withheld pending a decision as to whether there was a valid lien against these lots or not.

Whereupon, after the submission of the testimony of Chester Green, Willard S. Bowen, T. C. Sparks, T. H. Davie and O. F. Crowley, which were all of the witnesses testifying on the part of the plaintiffs, and all of whose testimony is substantially as hereinbefore set forth, and the introduction by the plaintiffs of their Exhibits Nos. 1 to 14, both inclusive, and 16, pertaining to case No. 731, and Nos. 1, 3, 4,

7, and 8 to 13, both inclusive, and 16, pertaining to case No. 743, which were all of the exhibits introduced on behalf of the plaintiffs, as hereinbefore set forth, and the introduction of defendant's Exhibit No. 1, counsel for the plaintiffs announced that the plaintiffs rest. Whereüpon counsel for the defendant moved the court to grant a non-suit because of the failure of the plaintiffs to prove a cause of action against the defendant in either of said actions in the following particulars:

That the evidence wholly fails to show that the plaintiffs are or have been the owners of any property at all;

That the evidence wholly fails to show that the property claimed by the plaintiffs, if any, was acquired prior to the time that the land within the several special improvement districts was acquired by the defendant for reservoir purposes; that the testimony of plaintiffs' witnesses show that if the plaintiffs acquired any property alleged to have been injured by the action of the defendant, it was acquired long after the lands within said improvement districts were purchased by the defendant;

That the evidence wholly fails to show that the plaintiffs or their respective predecessors in interest had any lien upon the property within said improvement districts; the evidence introduced on behalf of the plaintiffs shows the original assessments levied upon property within said special improvement districts to have been paid in full and in some instances overpaid; the

evidence further shows that no reassessment has been levied against the parcels of land within said improvement districts, in accordance with the statutes authorizing such reassessment, and in no event prior to the time the defendant acquired title to and possession of the property within said special improvement districts;

That the evidence further fails to show that the failure of payment of the bonds alleged to have been owned by the plaintiffs resulted from any action of the officers or agents of the defendant; that on the contrary the evidence shows that the failure of payment of such bonds resulted from numerous causes out of control of the defendant, among which were acts of the officers of the city of American Falls over which the defendant had no control or authority. The testimony shows that the acquisition of the property within said special improvement districts by the defendant resulted in the payment of a larger sum upon said bonds than would otherwise have resulted if said property had not been so taken by the defendant.

That the evidence further fails to show that the officers of the defendant at the time of taking the property within said special improvement districts recognized the holders of bonds of such districts as the owners of the several lots and parcels of land therein, or that said officers did not take and hold said property under claim of exclusive ownership in the United States.

"THE COURT: Motion denied.

MR. RAY: Note an exception, Mr. Reporter."

Be it further remembered that thereupon the court took the decision of said cases under advisement until January 13, 1932. Whereupon the court rendered and filed his Memorandum Opinion deciding in favor of plaintiffs and against the defendant. Be it further remembered that on January 14, 1932, the court made and entered its order in each of the above entitled cases allowing the defendant sixty days from the date thereof, to-wit, sixty days from January 14, 1932, to prepare, serve and file a draft of defendant's proposed bill of exceptions. Be it further remembered that the court on January 23, 1932, made and filed its special findings of fact and conclusions of law, and the counsel for the defendant did thereupon except to the ruling of the said court in the making of said findings of fact and conclusions of law, said exceptions to be included in the bill of exceptions filed herein and is assigned as follows:

The facts are insufficient to support the judgment; the evidence is insufficient to support the findings of fact; the evidence is insufficient to support the judgment. The court received and admitted incompetent, immaterial, irrelevant and hearsay evidence in support of the findings of fact; the court refused to receive and admit competent, relevant and material evidence offered in behalf of the defendant, which should have been the basis of the court's findings of fact; there was no substantial evidence to

sustain a finding in favor of the plaintiff and against the defendant; the conclusions of law as filed by the court should be in favor of the defendant and against the plaintiff;

And be it further remembered that thereafter on the 12th day of February, 1932, the defendant filed and served its Motion to Correct the Findings of Fact to conform to the evidence; be it further remembered that on February 22, 1932, at the Boise chambers of the court, the plaintiffs and the defendant being then and there represented by their respective counsel, the court denied the motion of the defendant to correct the findings of fact to conform to the evidence and declined to correct its findings of fact and conclusions of law in the manner pointed out in said objection or at all; and counsel for the defendant did thereupon except to the ruling of the court in overruling said motion and in refusing to amend its findings of fact and conclusions of law, and the exception is allowed accordingly.

Received copy Mar. 18th, 1932.

W. G. BISSELL.

APPENDIX

The following exhibits were admitted and are referred to in the foregoing testimony:

Plaintiffs' Exhibit 1 in case No. 731; four bonds of Local Sewerage Improvement District No. 1, American Falls, Idaho, $1000 each, numbered 21, 22, 23, and 24, respectively, and dated July 15, 1915; maturity date July 15, 1925.

Plaintiffs' Exhibit 2 in case No. 731; four bonds of Local Sewerage Improvement District No. 2, American Falls, Idaho, 3 for $500 each and one for $150.00, numbered 12 to 15, inclusive, dated August 1, 1916. Maturity date, August 1, 1926.

Plaintiffs' Exhibit 3 in case No. 731; six bonds of Local Improvement District No. 8, American Falls, Idaho; $500 each, and numbered 38 to 43, inclusive, dated September 1, 1916; maturity date September 1, 1926.

Plaintiff's Exhibit 4, in case No. 743; fourteen bonds of Local Improvement District No. 9, American Falls, Idaho; $500 each, numbered 38 to 51, inclusive, and dated September 1, 1916; maturity date September 1, 1926.

Plaintiffs' Exhibit 4 in case No. 731; newspaper clipping of printed ordinances 55, 64, 65, 66, 68 and 69 of the Village of American Falls, pertaining to Local Sewerage Improvement District No. 1, American Falls, Idaho.

Plaintiffs' Exhibit 5 in case No. 731; newspaper clippings of printed ordinances Nos. 68, 74, 79 and 83 of the Village of American Falls, Idaho, pertaining to Local Sewerage Improvement District No. 2, American Falls, Idaho.

Plaintiffs' Exhibit 6 in case 731; newspaper clippings of printed ordinances Nos. 75, 80, and 84 of the Village of American Falls, Idaho, pertaining to Local Improvement District No. 8, American Falls, Idaho.

Plaintiffs' Exhibit 7 in case No. 743; newspaper clippings of printed ordinances Nos. 70,

76, 81 and 85 of the Village of American Falls, Idaho, pertaining to Local Improvement District No. 9, American Falls, Idaho.

Plaintiffs' Exhibit 8 in cases No. 731 and 743; copy of report of Auditor Willard S. Bowen, upon audit of funds of Improvement Districts 1, 2, 8 and 9 of American Falls, Idaho, covering a period from the opening of accounts to February 28, 1923.

Plaintiffs' Exhibit 9 in cases Nos. 731 and 743; copy of report of Auditor Bowen upon audits of general funds of the Village of American Falls from January 1, 1916 to October 31, 1926, and of the funds of Improvement Districts 1, 2, 8 and 9 covering a period from March 1, 1923 to October 31, 1926; report dated December 18, 1926.

Plaintiffs' Exhibit 10 in cases Nos. 731 and 743; copy of report of Auditor Bowen upon audit of general funds and funds of Improvement Districts 1, 2, 8 and 9 of American Falls, Idaho, covering period from October 31, 1926 to May 3, 1927; report dated June 6, 1927.

Plaintiffs' Exhibit 11 in cases Nos. 731 and 743; copy of report of Auditor Bowen upon audit of funds of Improvement Districts Nos. 1, 2, 8 and 9, American Falls, Idaho, from May 3, 1927 to May 5, 1931; report dated June 1, 1931.

Plaintiffs' Exhibit 12 in cases Nos. 731 and 743; copy of report of Auditor Bowen upon audit of general funds of City of American Falls, Idaho, from May 3, 1927 to May 5, 1931; report dated June 1, 1931.

Plaintiffs' Exhibit 13 in cases Nos. 731 and 743; photostatic copy of the original assessment roll of the village of American Falls, covering assessments levied and extended for a ten-year period, upon each lot or parcel of land within Improvement Districts 1, 2, 8 and 9, American Falls, Idaho.

Plaintiffs' Exhibit 14 in case No. 731 and Exhibit 3 in case No. 743; being a computation by Willard S. Bowen of the amounts due upon bonds (Plaintiffs' exhibits 1 to 4, inclusive) of Improvement Districts 1, 2, 8 and 9 of American Falls, Idaho, computed to November 1, 1931.

Plaintiffs' Exhibit 16 in cases Nos. 731 and 743; newspaper clippings of printed ordinances 122 to 125, inclusive of the city of American Falls, pertaining to reassessments in Improvement Districts Nos. 1, 2, 8 and 9, respectively, American Falls, Idaho; dated July 3, 1928.

Plaintiffs' Exhibit 1 in case No. 743; a compilation by T. C. Sparks of lots within Local Improvement District No. 9, American Falls, Idaho, acquired by the defendant for reservoir right of way purposes, with amount set after each lot of the amount of a purported reassessment under city ordinance 125 (Plaintiffs' Exhibit 16).

Defendant's Exhibit 1; being copy of land purchase contract of date of December 9, 1925, between the United States of America and C. F. Dahlen, for the purchase of Lot 7 of Block 64 of Riverside Addition to American Falls, for a consideration of $2,425.00.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS

United States of America,)
) ss.
District of Idaho)

I, Charles C. Cavanah, U. S. District Judge for the District of Idaho, and the Judge before whom the within entitled action was tried, to-wit: the cause entitled The J. K. Mullen Investment Company, plaintiff, vs. The United States of America, defendant, which is case No. 743, in said District Court;

DO HEREBY CERTIFY That the matters and proceedings embodied in the foregoing bill of exceptions are matters and proceedings occurring in said cause and the same are hereby made a part of the record therein, and that the above and foregoing bill of exceptions contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record therein; and contains all the evidence, oral and in writing therein save and except plaintiff's Exhibits 1, 4, 7, 8 to 13, inclusive, and 16, and defendant's Exhibit 1, the original of which the clerk is hereby ordered to transmit to the Appellate Court with the transcript of record and as a part thereof;

I FURTHER CERTIFY That the above and foregoing bill of exceptions was duly and regularly filed with the clerk of said court and thereafter duly and

regularly served within the time authorized by law and that no amendments were proposed thereto excepting such as are embodied therein;

I FURTHER CERTIFY That due and regular notice of time and place for settlement and certifying said bill of exceptions was given.

Dated at Boise, Idaho, this 12th day of May, 1932.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

EXCEPTIONS TO THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Filed Feb. 22, 1932

Comes now here the United States of America by its counsel and excepts to the special findings of fact and conclusions of law found, made and filed by the court on the 23rd day of January, 1932, for the reasons following:

That the facts are insufficient to support the judgment; the evidence is insufficient to support the findings of fact; the evidence is insufficient to support the judgment; the court received and admitted incompetent, irrelevant, immaterial and hearsay evidence over the objections of the defendant in support of the findings of fact. The court refused to receive and admit competent, relevant and material evi-

dence offered on behalf of the defendant, which should have been the basis of the court's finding of fact. There was no substantial evidence to sustain a finding in favor of the plaintiff and against the defendant.

There is no evidence to support finding number 4 of the court and said finding is contrary to the evidence.

There is no evidence to support finding number 7 of the court and finding number 7 is contrary to the evidence.

There is no evidence to support finding number 10 of the court and said finding is contrary to the evidence.

There is no evidence to support finding number 11 of the court and the said finding is contrary to the evidence.

There is no evidence to support finding number 13 and said finding is contrary to the evidence.

There is no evidence to support finding number 14 and said finding is contrary to the evidence.

There is no evidence to support finding number 15 and said finding is contrary to the evidence.

There is no evidence to support finding number 16 and said finding is contrary to the evidence.

There is no evidence to support finding number 17 and said finding is contrary to the evidence.

There is no evidence to support finding number 18 and said finding is contrary to the evidence.

There is no evidence to support finding number 19 and said finding is contrary to the evidence.

That the defendant excepts to the first Conclusion of Law of the court for the reason that the same is not supported by the facts found by the court, or by the evidence and is contrary to the law.

Defendant excepts to the second Conclusion of Law of the court for the reason that the same is based upon insufficient findings of fact, and is not supported by the law.

Defendant excepts to the third Conclusion of Law of the court for the reason that the same is not based upon the facts found by the court, and is contrary to the law.

Defendant excepts to the fourth Conclusion of Law of the court for the reason that the same is not based upon the facts found by the court and is contrary to the law.

That the defendant excepts to the failure of the court to conclude as a matter of law in favor of the defendant and against the plaintiff.

H. E. RAY,

B. E. STOUTEMYER,

Attorneys for the Defendant.

Exceptions noted and allowed, this 22 day of February, 1932.

CHARLES C. CAVANAH,

District Judge.

(Title of Court and Cause)

DEFENDANT'S MOTION TO CORRECT FINDINGS OF FACT TO CONFORM TO THE EVIDENCE

Filed Feb. 13, 1932

Comes now the defendant and respectfully shows to the court that the written transcript of the evidence in the above entitled cause is now available, and that such transcript shows beyond question that many of the findings of fact heretofore signed by the court are entirely without evidence to support them and are directly in conflict with the evidence, wherefore defendant moves the court to correct the findings of fact heretofore filed in the following particulars to conform to the evidence:

1. Defendant moves the court to strike out of finding No. 10 the words,

"on or about the 1st day of January, 1927"

and the words

"without any proceedings in eminent domain"

and the words

"the defendant being well aware and advised that the bonds so held by this plaintiff, and the interest thereon, were outstanding, due, and unpaid, and that the assessments levied against the property were insufficient to pay outstanding bonds so held by the plaintiff"

and the words

> "sold, destroyed, or removed all improvements located upon the lots and parcels of land within said improvement districts"

and the words

> "and thereby deprived the plaintiff of its property and totally destroyed plaintiff's said property"

and the words

> "and permanently destroyed plaintiff's one and only method of enforcing the payment of the assessments and bonds aforesaid"

and the words

> "and that the property so taken by the defendant as aforesaid, was at the time of such taking and destruction of a value greatly in excess of plaintiff's said claim";

on the ground that there is no evidence whatever to support the finding that the property so taken by flooding was at the time of the taking of a value greatly in excess of the claim of the plaintiff, and no evidence of any kind whatever as to the value of the property, or any part thereof; that there is no evidence that the taking of the land and the flooding thereof or the removal of the improvements occurred on the 1st day of January, 1927, but that all the evidence is to the contrary; that there is evidence showing that part of the property was acquired by

condemnation but no evidence whatever as to who were the defendants in the condemnation suits and no evidence whatever to support the finding that the taking of the property was without any proceeding in eminent domain; that there is no evidence whatever to support the finding that the defendant sold or destroyed or removed all improvements located on the lots and parcels within said improvement districts on January 1, 1927, or at any other time, or at all, the evidence as to the removal of the improvements being the evidence of the plaintiff's witness T. C. Sparks, who testified that he was a lot owner in the area flooded by the reservoir and was the mayor of the town and that he himself removed his own improvements in April, 1925; that Mr. Sparks' testimony, which is the only testimony in the record as to who removed any of the buildings or as to the time when the removal of buildings and improvements occurred, is as follows, reduced to narrative form:

> "It would be hard to say when the United States government flooded the old townsite of American Falls; not at one time, as the lands were not all on the same level and were not all flooded at the same time. Portions of land in special improvement districts 1, 2 and 8, I would say, were flooded late in the fall of 1925 or the winter of 1925 and the spring of 1926 as the water rose during storage. One of the last buildings moved off of the old townsite, as I recall,

> was the Grand Hotel. I cannot fix the date exactly as to when it was moved, perhaps in the late winter of 1925 or perhaps in the spring of 1926. My house was about the 5th house left on the townsite, and *I moved it off in April, 1925*, and between that date and the time of the removal of the Grand Hotel was the period of removing the balance of the buildings";

that it was a common practice for the lot owners to reserve the right to their buildings and other improvements and to remove such buildings themselves and that it appears is what was done in Mr. Sparks' case and his is the sole testimony as to who moved any of the buildings and improvements; that defendant therefore moves the court to substitute, in lieu of the portions of finding 10 herein moved to be stricken out, a finding as follows:

> That during the year 1925, and prior thereto, the buildings and improvements were removed from the lots in the reservoir site, that the plaintiff's witness T. A. Sparks, one of the lot owners, testified that he moved his house in April, 1925, and that there was no testimony as to who moved any of the other houses or improvements.

2.

Defendant further moves the court to strike from finding No. 7 the words,

> "upon the issuance of said bonds, and before maturity thereof, the said J. K. Mullen acquired all of said bonds, paying therefor the full face

> value thereof, and that afterwards the said J. K. Mullen transferred said bonds to the plaintiff, the J. K. Mullen Investment Company",

on the ground that there is no evidence to support the above quoted finding.

3.

Defendant further moves the court to strike out all of finding No. 11 and to strike out of finding No. 17 that part thereof reading,

> "that no money collected for the payment of said bonds was lost through the delay and neglect of the city officials to apply promptly the moneys collected from the lot owners for the retirement of the bonds"

and also to strike out that part of finding No. 17 reading,

> "that at the time the United States took possession of the property in said American Falls reservoir site and applied the same to a public use, the United States and the officials of the United States in charge of the property took the same as the property of private individuals and at the time of the taking, recognized the rights of the plaintiff and withheld from the private individuals owning said property an amount of money sufficient to discharge the claim of the plaintiff",

for the reason that said finding No. 11 and the said above quoted portions of finding No. 17 are not sup-

ported by the evidence but are contrary to the evidence; and the defendant moves the court to substitute, in lieu of said finding No. 11 and the said above quoted portions of finding No. 17, the following:

> That at the time the United States, acting through the officer of the United States Reclamation Bureau in charge of the construction and operation of said reservoir, F. A. Banks, took possession of the said property in the said improvement districts in the American Falls reservoir site, and flooded the same as a portion of the said American Falls reservoir, the said officer of the United States in charge of said work claimed the title to said premises was in the United States by reason of the previous purchase and condemnation thereof by the United States and the conveyance of said property to the United States prior to said flooding, and did not recognize the plaintiff herein, or the bondholders, as the owner of said premises, or of any part or interest therein; that in connection with some of the lot purchases, a portion of the purchase price was temporarily suspended pending an opinion as to whether or not there could be any valid lien on the property in the event of an attempted re-assessment after conveyance to the United States, and upon recepit of legal opinion by the legal advisers of the government that there could be no such valid lien, the amount of money temporarily suspended was paid over to the lot owners by the United States pursuant to the terms of the contracts.

This motion is made upon the records and files in this case and the evidence as submitted to the court.

The defendant further requests that in the event the foregoing motion, or any part thereof, is overruled by the court, that defendant's exception thereto be noted.

H. E. RAY,
B. E. STOUTEMYER,
Attorneys for Defendant.

(Title of Court and Cause)

MOTION FOR APPEAL
Filed Mar. 21, 1932

COMES NOW The above-named defendant, the United States of America, and enters its appeal from the final judgment of this court made and filed in the above cause on the 28th day of January, 1932, to the United States Circuit Court of Appeals, for the Ninth Circuit, returnable before said court at San Francisco, in the state of California.

The said plaintiff, the J. K. Mullen Investment Company, a corporation, and W. G. Bissell, its attorney of record, will take notice of said appeal.

H. E. RAY,
United States Attorney for the District of Idaho,
Attorney for Defendant Appellant.

(Title of Court and Cause)

PETITION FOR APPEAL

Filed Mar. 21, 1932

TO THE HONORABLE CHARLES C. CAVANAH, DISTRICT JUDGE:

Comes now the above-named defendant, United States of America, and says that on or about the 28th day of January, A. D. 1932, this court entered judgment against said defendant, in which judgment and proceedings had thereunto in this cause certain errors were committed to the prejudice of the defendant, all of which errors will appear more in detail from the Assignments of Error, which is filed with this petition.

And petitioner further says that said cause was brought against said defendant under Title 28, Section 41, U. S. C. A.; that this appeal is sought and brought up by direction of a department of the government of the United States, to-wit, the Department of Justice, and the said defendant in petition herein is acting under the direction aforesaid, and no bond for costs, supersedeas or otherwise ought, pursuant to Sections 869, 870, Title 28, United States Code, be taken or required.

WHEREFORE, The said defendant prays that an appeal be allowed in its behalf in the United States Circuit Court of Appeals for the Ninth Cir-

cuit of the United States for the correction of the errors so complained of; that said allowance operate as a supersedeas and no bond therefor or for costs or otherwise be required and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be sent to said Circuit Court of Appeals, and that citation issue as provided by law.

H. E. RAY,
United States Attorney for the District of Idaho.

(Title of Court and Cause)

ASSIGNMENTS OF ERROR
Filed Mar. 21, 1932

The defendant assigns as errors in rulings of the court in the above entitled cause as follows:

ASSIGNMENT NO. 1

That the court erred in holding that the court had jurisdiction of this action and jurisdiction to render judgment against the United States herein:

1-a. In that there is no contract, express or implied, between the United States and the plaintiff herein and that the cause of action, if any, arises in tort.

1-b. In that the action of the United States complained of as having defeated plaintiff's

alleged sole remedy of re-assessment, namely, the action of the United States in acquiring title by purchase or condemnation to all lands in the reservoir site including those in the special improvement districts which removed the property from the taxing or assessing power of the city and state, is shown to have occurred in most cases more than six years prior to filing of this action and that plaintiff wholly failed to show what, if any, of the lots were condemned, purchased or conveyed to the United States within six years of the date of the filing of this action.

1-c. In that the loss or damage, if any, suffered by the plaintiff was of a remote, indirect, and consequential nature of a class for which congress has given the court no jurisdiction to award judgment against the United States.

1-d. In that this is an action which under the state law could not be maintained against a private lot owner, the private lot owner not being personally liable for special improvement assessments against his property, even when such assessments are valid and unpaid, the remedy being against each lot separately for its assessed portion of the cost without any authority for a personal judgment against the lot owner, and that congress has not under any condition subjected the United States to any greater liability or different form of action from that to which the private citizen or lot owner would be liable.

1-e. That the officer of the United States in charge of the construction and operation of the reservoir at the time that he took possession of

the land in the reservoir site and at the time that he flooded the land with the waters of the reservoir and applied the land to use for reservoir purposes did so under a claim of title in the United States by reason of the previous purchase and condemnation of the property and did not recognize plaintiff as the owner thereof or of any interest therein.

ASSIGNMENT OF ERROR NO. 2

That the court erred in overruling defendant's demurrer to plaintiff's amended complaint and erred in overruling each of the several grounds of demurrer set out therein.

ASSIGNMENT OF ERROR NO. 3

That the court erred in overruling defendant's motion to strike and defendant's motion to make plaintiff's amended complaint more definite and certain.

ASSIGNMENT OF ERROR NO. 4

That the court erred in his findings of fact herein, in that the said finds of fact are not supported by the evidence but are contrary to the evidence, and in including in said findings of fact numerous statements which are conclusions of law and are incorrect statements of the law.

ASSIGNMENT OF ERROR NO. 5

That the court erred in rendering judgment against the United States in an amount measured

by the unpaid balance of the bonds and interest thereon, and that such is not the proper measure of damages, and that the United States, if liable at all, could only be held liable for such part, if any, of the loss as is shown to have been caused by the United States. That many causes of loss for which the United States was in no way responsible are shown to have contributed to the default in the payment of the bonds, and that the undisputed evidence of plaintiff's own witnesses shows that the action of the United States in purchasing and condemning the real property in question not only did not cause any loss to the bondholders but, to the contrary, was distinctly beneficial to the bondholders and resulted in the payment of a larger percentage of the bonds than would otherwise have been paid, and that for that reason there was a much smaller percentage of defaulted bonds in the districts where the United States purchased or condemned all the property than in the district where the United States took only a small percentage of the property.

ASSIGNMENT OF ERROR NO. 6

That the court erred in finding, concluding and holding in his findings of fact finding No. 9 and in inserting the various allegations therein contained, in that each and every allegation contained in said finding No. 9 is purely a conclusion of law and that each and every statement therein contained is an

erroneous one, particularly the legal conclusion that the entire bond issue is a lien on each and every lot in the district notwithstanding the fact elsewhere established by the evidence found by the court (finding No. 16) that the original assessment for the payment of the bonds was paid in full by the United States, and the admission that the attempted re-assessment was void and of no effect.

ASSIGNMENT OF ERROR NO. 7

That the court erred in holding that the plaintiff may recover from the United States for an alleged loss claimed to have resulted from a taking by the United States of real property on which the plaintiff as a bondholder claims a lien where the plaintiff acquired the bonds, if at all, after the United States had taken the real property in question, and the plaintiff has failed to show that it owned any bonds or property of any kind at the time of the taking which is claimed to have caused the loss or damage.

ASSIGNMENT OF ERROR NO. 8

That the court erred in rendering judgment against the United States in the amount named in the judgment herein or in any amount.

ASSIGNMENT OF ERROR NO. 9

That the court erred in that part of its finding No. 16, reading

> "That prior to the taking of the property and use as a part of the American Falls reservoir

> and prior to the flooding thereof, the defendant did not pay or cause to be paid all the liens against said improvement districts, *but only paid the amount shown upon the original assessment,"*

in that the finding that the United States paid the original assessment, which was the only assessment ever made except the admittedly void re-assessment attempted several years after the United States had acquired title to the property, renders the statement that

> "the defendant did not pay or cause to be paid all the liens against said improvement districts"

either an immaterial reference to liens held by third parties and in which the plaintiff had no interest, or an erroneous conclusion of law intended to imply that the bonds themselves are still a lien after the full payment of the assessment.

ASSIGNMENT OF ERROR NO. 10

That the court erred in finding that the plaintiff owned or acquired any bonds at any time prior to 1928, or at all, and erred in admitting over defendant's objections the incompetent hearsay testimony of the witness Chester Green (who was the only witness who testified concerning the ownership of the bonds) in view of the repeated statement of the witness that all he knew concerning the ownership of the bonds was what Mr. Mullen or someone else told him.

ASSIGNMENT OF ERROR NO. 11

That the court erred in overruling defendant's motion for a non-suit herein.

ASSIGNMENT OF ERROR NO. 12

That the court erred in each and every conclusion of law filed herein, both as to the conclusions of law which are filed as conclusions of law and the conclusions of law which are filed as findings of fact herein.

ASSIGNMENT OF ERROR NO. 13

That the court erred in the court's conclusion of law No. 1 in that even if the same were a correct statement of the law, it does not support the judgment but is in conflict with the judgment, and that the court has entered judgment contrary to and in conflict with the legal principle announced in conclusion No. 1, in that said conclusion No. 1 holds the liability of the United States to be for

> "all damages suffered by any and all persons owning or having unpaid liens upon the real estate within said district up to an amount not exceeding the reasonable value of the property taken by it"

and that no evidence whatever has been offered as to the value of the property or of any lot, block or parcel thereof. That it has been found (finding No. 16) that the United States paid in full the original assessment, which was the only valid assessment ever

levied and therefore the only lien and the only assessment ever attempted other than the admittedly void re-assessment attempted to be levied years after the United States had acquired title to the property. That, there being no unpaid lien, the judgment is in conflict with conclusion of law No. 1.

ASSIGNMENT OF ERROR NO. 14

That the court erred in that conclusion of law No. 1 is erroneous in holding that the United States contracted "impliedly", or at all, and in holding that the United States impliedly contracted "to pay *all damages suffered*", in that if the United States were liable at all, under no theory of law can it be held liable for any damage other than that shown to have been caused by it, which was no damage at all, as the evidence shows that the action of the United States was on the whole beneficial to the bondholders and resulted in the payment of a larger proportion of the bonds than would otherwise have been paid.

ASSIGNMENT OF ERROR NO. 15

That the court erred in its conclusions of law No. 2 and No. 5, in that if the United States were liable at all, said conclusions No. 2 and No. 5 do not state the proper measure of damages.

ASSIGNMENT OF ERROR NO. 16

That the court erred in holding that this action is not barred by statute of limitations.

ASSIGNMENT OF ERROR NO. 17

That the court erred in holding in effect that the facts as set out in that part of finding No. 5, reading

> "that through mistake or inadvertence the levies and assessments so made and levied were not in fact sufficient to pay the principal and interest on said bonds as the same became due and payable"

established a right to or remedy by re-assessment under the state law, Section 4141, Idaho Compiled Statutes, which authorizes or permits re-assessment only when

> "for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay *the costs of sewerage improvement.*"

That therefore no facts have been alleged, proved or found by the court sufficient to authorize re-assessment even against privately owned land. That therefore the court erred in holding that the United States, by purchasing or condemning the property, deprived the plaintiff of its sole remedy, or any remedy, which it would otherwise have had, even if under any condition the termination of the taxing power of the municipality or state by reason of the conveyance of property to the United States could give rise to a right of action against the United States for the amount of the tax or assessment which might have been levied against the property had it remained in private ownership.

ASSIGNMENT OF ERROR NO. 18

That the court erred in rendering judgment for an amount based upon and determined by the unpaid balance of the bonds and interest thereon, in that the lien of the assessments for the payment of special improvement bonds, which assessment the court has found has been paid (finding No. 16), even if it had remained unpaid would be only a secondary lien subject to a first and superior lien for state and county taxes, and that part of the property was shown to have been sold for taxes prior to purchase or condemnation by the United States and there was no evidence and is no finding as to the extent to which the secondary lien, if any, of the assessment for bond payment was extinguished by tax sale in enforcement of the superior lien of the state and county taxes.

ASSIGNMENT OF ERROR NO. 19

That the court erred in that the maximum amount for which the United States could be held liable under any condition on account of the taking of any lot or tract of land for a public purpose (even if it had not already paid the full value including all valid assessments and liens of record) would be the reasonable market value of the land, and that no evidence whatever has been offered herein as to the value of the real property taken by the United States or any part thereof, or as to whether the value thereof did or did not equal the amount of the bonds.

ASSIGNMENT OF ERROR NO. 20

That the court erred in its finding No. 10 in finding that the United States took and flooded the property in the said improvement district for reservoir purposes on January 1, 1927, in that there is no evidence to support such finding and that the same is in conflict with the evidence, and that the court erred in holding and finding that the United States on January 1, 1927, or at any other time, "sold, destroyed or removed all improvements located upon the lots and parcels of land within said sewerage and improvement districts", in that there is no evidence to support said finding and that the same is contrary to the evidence, the only evidence as to who removed the improvements being that of plaintiff's witness Sparks, who testified that he removed his own house in April, 1925, the sole testimony on this question (that of T. C. Sparks), reduced to narrative form, being as follows:

> "It would be hard to say when the United States government flooded the old townsite of American Falls; not at one time, as the lands were not all on the same level and were not all flooded at the same time. Portions of land in special improvement districts 1, 2, and 8, I would say were flooded late in the fall of 1925 or the winter of 1925 and the spring of 1926 as the water rose during storage. One of the last buildings moved off of the old townsite, as I recall, was the Grand Hotel. I cannot fix the

date exactly as to when it was moved, perhaps in the late winter of 1925 or perhaps in the spring of 1926. My house was about the 5th house left on the townsite, and *I moved it off in April, 1925*, and between that date and the time of the removal of the Grand Hotel was the period of removing the balance of the buildings."

ASSIGNMENT OF ERROR NO. 21

21-a. That the court erred in admitting and receiving in evidence the testimony of Chester Green, over the objection of the defendant, as follows:

"Q. Who were present when those bonds were delivered to me for collection?

A. J. K. Mullen.

Q. And as whose property were they delivered to me for collection?

MR. STOUTEMYER: We object to that on the ground that it is not the best evidence, incompetent, and based on hearsay statements, so far as this witness is concerned, as shown by his previous testimony.

THE COURT: Objection overruled."

21-b. That the court erred in admitting and receiving the testimony of said witness Green over the objection of the defendant, and in overruling the motion of the defendant to strike the following testimony:

"A. Mr. Mullen organized the J. K. Mullen Investment Company as a sort of a holding company for the various interests he was interested

in; the Benevolent Corporation he simply organized and transferred the bonds to it as a gift to them.

Q. Do you know that to be a fact?

A. That is what he told me.

Q. No. Where did you find these bonds that you gave to me?

A. Mr. Mullen gave them to me.

Q. Who delivered them to you?

A. Mr. Mullen gave them to me personally.

Q. With your understanding at that time that they were to be the property of that company?

A. Yes.

Q. All of these bonds that you have testified to?

A. Yes, part of them to the Investment company and part to the Benevolent corporation.

Q. You say 'part of them'?

A. Bonds in districts 1, 2 and 8 were for the Benevolent corporation, and in district 9 were for the J. K. Mullen Investment Company.

Q. Case No. 743 is the Investment company and No. 731 is the Benevolent corporation?

MR. RAY: We register the same objection to this as we did to the former question, upon the ground that there is not sufficient identification of the property.

MR. STOUTEMYER: In view of the information given by counsel that the delivery was made by Mr. Mullen and not by the president of this corporation or any officer of it, and that the only knowledge that the witness has in re-

gard to the ownership of the bonds was what Mr. Mullen or someone else told the witness, we wish to make the further objection to any further testimony and move to strike out the previous testimony on the ground it is incompetent and not the best evidence and hearsay.

THE COURT: The bonds in these two suits involved here were delivered to you as the property of these two companies?

A. Yes, sir.

THE COURT: Did you take them and deliver them to Mr. Bissell for collection?

A. Mr. Mullen and myself together.

THE COURT: You two together?

A. Yes.

THE COURT: Objection overruled. Motion to strike denied. Anything further?

MR. STOUTEMYER: In stating that these bonds were delivered to you, part of them as the property of one corporation, and part the property of another, do you base your opinion on what somebody told you? You have no knowledge of it other than what was told to you by someone?

A. No, sir."

21-c. That the court erred in admitting and receiving, over the objection of the defendant, the following testimony of witness Green:

Q. As an employee of the J. K. Mullen system, of which the Oneida Elevator was a part and the Gooding Elevator company a part, and the Interocean Mills a part, from time to time

were you delivered notes, bonds and securities for collection and instructed by the company delivering them to you to what subsidiary corporation those things belonged?

MR. STOUTEMYER: We object to that question on the ground it is incompetent, and it has not been shown that this witness was an employee of the Mullen corporations generally, but only by the Gooding Elevator Corporation.

THE COURT: Objection overruled.

A. Yes, sir."

21-d. That the court erred in overruling and denying the motion of the defendant to strike the testimony of the said witness Green as follows:

"Q. Now what corporations were in the Mullen organization and for whom did you make collections?

MR. STOUTEMYER: That is not the best evidence of what was controlled by Mr. Mullen. There is evidence of record of that fact.

THE COURT: Yes, that goes to the question of identifying the corporations.

MR. BISSELL: Here is the situation we are evidently confronted with. Mr. J. K. Mullen, as the court I think well knows, was interested in many, many corporations throughout Southern Idaho. Among those were the Victory Mills at American Falls, Gooding and Jerome, Twin Falls and Idaho Falls. All of these things were run as separate corporations under a separate name, usually called after the town or county in which they were operating. Therefore, when

papers were sent out to their district manager for collection the district manager always was advised as to which particular one of these separate corporate entities this particular piece of paper belonged; that was the practice, and it goes to establish the ownership. That is the only object of this testimony, and I think it is material in order to develop the idea brought out by Your Honor in your question.

THE COURT: Answer the question.

(Question read.)

A. Yes, sir.

Q. And were suits brought on those obligations and in accordance with instructions which you received?

MR. RAY: That is immaterial, Your Honor.

THE COURT: Objection overruled.

A. Yes, sir.

MR. BISSELL: That is all.

MR. STOUTEMYER: We now move to strike all the testimony of this witness on the ground it is hearsay and not the best evidence; that the witness is incompetent to answer the question.

THE COURT: Motion denied.

MR. STOUTEMYER: (Cont.) In respect to the ownership of these bonds and his relationship to these corporations.

THE COURT: Motion to strike denied."

ASSIGNMENT OF ERROR NO. 22

22-a. That the court erred in admitting and receiving testimony of witness Willard S. Bowen as follows:

"A. That is a carbon copy of the original report of audit covering the Local Improvement Districts Nos. 1, 2, 8 and 9, of the City of American Falls, Idaho, from the date of their organization to February 28, 1923, the original of same having been presented to the City of American Falls for their records.

MR. STOUTEMYER: We have no objection to the compilation in so far as it is applicable to the issues involved in this case, but we do object to the report upon the ground that there are other matters and statements not admissible; and on the further ground that under the decision of this court the re-assessment is void; the only valid assessment was the original assessment. The only issue involved in these accounts is a question whether the original assessments were paid. And further, that in so far as purporting to apply to the payment of the original assessment, if there is any part of it applying to that, it is also improper and irrelevant and immaterial because that issue has not been raised by the pleadings, the plaintiff having never alleged any failure to pay any part of the original assessment, which was the only valid assessment. As I understand it, the allegations of the complaint are that through mistake or inadvertence the original assessment was not sufficiently large and that that was partly responsible for the non-payment of the bonds. A re-assessment is only permissible when through mistake or inadvertence the original assessment was insufficient to pay. This data

would only be material for that purpose. The original assessment—the re-assessment was attempted more than two years after the title passed to the United States, and that having been decided to be valid, all of these data and all of these records become immaterial except as to the payment on the original assessment, and that is not material because not alleged it was not paid, and no claim it was not paid.

THE COURT: That now presents the second question. I think I will reserve my ruling on that until the final argument. There might be matters in there that are mere statements of the witness here.

MR. BISSELL: That is a report of audit, and the report of an auditor is always a conclusion.

THE COURT: I will reserve my final ruling on that question as to the admissibility of this evidence.

MR. BISSELL: Subject to that it will be admitted?

THE COURT: Yes, received subject to final ruling."

22-b. That the court erred in admitting and receiving in evidence plaintiff's Exhibit 9 over the objection of the defendant as follows:

"MR. BISSELL: I now offer that in evidence, the second audit report.

MR. STOUTEMYER: We object to that on the grounds as stated in the former objection.

THE COURT: The same ruling and understanding, and it will be received at this time."

22-c. That the court erred in admitting and receiving in evidence plaintiff's Exhibit 10 over the objection of defendant as follows:

> "Q. Handing you a paper which has been marked plaintiff's Exhibit No. 10 for identification, in case No. 731, I will ask you if that contains a report which you made for the City of American Falls and the audit just referred to?
>
> A. Yes, that is a carbon copy of the original report that was handed to the officers of the City of American Falls.
>
> MR. BISSELL: That is offered in evidence, dated June 6, 1927.
>
> MR. STOUTEMYER: That is objected to on the grounds stated with reference to the previous offers.
>
> THE COURT: Admitted with the same understanding and reservation of ruling."

22-d. That the court erred in admitting and receiving in evidence plaintiff's Exhibit 11 over the objection of the defendant, as follows:

> "MR. BISSELL: I will ask that the report of the audit of June 1st, 1931, as to special improvement funds be marked as Exhibit No. 11 in case 731, and that the report of the general audit of the same date, dated June 1st, 1931, be marked as Exhibit No. 12 in 731.
>
> MR. STOUTEMYER: That is objected to on the same grounds as to the last three exhibits, and on the additional ground in so far as they relate to the cause of action in this suit was filed

previous to that and cannot be used to support a claim for the recovery of compensation, which must be based on the rights that the plaintiff had prior title. That is in addition to the other grounds.

THE COURT: Overruled.

MR. STOUTEMYER: I wish to move in this connection to strike out all of the Exhibits Nos. 8, 9, 10 and 11 as not applicable to the issues as presented by the pleadings and by the decision of this court an attempted re-assessment is not valid.

THE COURT: I will receive this exhibit with the same understanding as the others, that the court will reserve its ruling on the motion to strike. This goes to one of the main questions in the case."

22-e. That the court erred in admitting and receiving in evidence the testimony of witness Bowen as follows:

"Q. As a result of that examination did you determine as a mathematical problem whether or not the assessment as originally assessed is sufficient, as evidenced by that assessment roll, to pay the interest on the bonds and the principal as it became due, in accordance with the terms of the bonds, in District No. 1?

MR. STOUTEMYER: We object to that on the same grounds that were urged to the previous offers.

THE COURT: Objection overruled. Admitted."

22-f. That the court erred in admitting and receiving in evidence the testimony of witness Bowen as follows:

"Q. To what representative of the United States Reclamation Service did you make these reports?

A. Mr. F. C. Bohlson.

Q. What position, if any, did Mr. Bohlson occupy in American Falls at this time, if you know?

MR. STOUTEMYER: We object to that as incompetent, irrelevant and immaterial.

THE COURT: Objection overruled.

A. I am not able to state what position except in a general way.

Q. What was that position in a general way?

A. Well, he was apparently looking after the condemnation details, condemnation of the rights of way.

Q. And arranging for the payment of taxes to the county and apparently handling the accounts in—

MR. STOUTEMYER: (Int.) That is not within the knowledge of this witness.

Q. Do you know if Mr. F. Bohlson was an employee of the United States Reclamation Service at American Falls?

MR. STOUTEMYER: Not in responsible charge; a clerk in the office.

MR. BISSELL: I wondered if there was any real controversy about that.

MR. STOUTEMYER: We are willing to concede that he was a clerk in the office at Ameri-

can Falls, also a clerk in the Reclamation office in American Falls. He will go on the stand.

THE COURT: The objection is well taken.

MR. BISSELL: It is now conceded that Mr. Bohlson was a clerk in the employ of the United States Reclamation Service at American Falls, Idaho?

MR. STOUTEMYER: You have got the record as to that, Mr. Ray?

MR. RAY: That is agreed to.

Q. As auditor of the City of American Falls, did you take the matter of these unpaid bonds up with Mr. Bohlson?

A. I did.

Q. Did you at that time inform Mr. Bohlson as to the amount of bonds due?

MR. STOUTEMYER: We object to this question on the grounds previously stated, incompetent, irrelevant and immaterial.

MR. BISSELL: It is a question whether or not the government acted in good faith in the purchase of those lands if the man in charge of their office had information of the fact these bonds were due.

MR. STOUTEMYER: The question is whether this man was in charge in such a capacity to bind the government.

THE COURT: The record is not satisfactory on that point. Objection sustained.

Q. What, if anything, did Mr. Bohlson state as to any provision that had been made for the payment of these bonds?

MR. RAY: That is immaterial, and not bind-

ing on the government, no matter what he said.

MR. STOUTEMYER: Also hearsay. You have to show that this man had some authority to bind the government before that evidence is received.

THE COURT: If you make a connection showing this clerk's statements were binding I will allow it.

MR. BISSELL: I want to introduce it for the purpose of showing that a certain amount of money was held out, and if we can then it is competent.

THE COURT: I will allow it in subject to your making that connection. If you don't connect it up I will strike it.

Q. Answer the question.

A. What was the question?

(Question read.)

A. He said that there was held in some sort of a fund approximately $13,000.00."

22-g. That the court erred in admitting and receiving in evidence the plaintiff's Exhibit 14 over the objection of the defendant, as follows:

"MR. BISSELL: Very well. I offer that in evidence as plaintiff's Exhibit 14. (Exhibit 3 in case 743.)

MR. STOUTEMYER: That is objected to on the ground that the United States is not liable for the interest, and on the further ground the right of compensation in this case, if it exists at all, must have existed as of the date the suit was filed.

THE COURT: Objection overruled."

22-h. That the court erred in sustaining the objection of the plaintiff to the testimony of the witness Bowen testifying on cross-examination, as follows:

> "Q. And then would you say from an examination of your books and the setup for interest and assessment that the manner of making the assessments and the mistake contained therein was responsible for the fact that the interest and principal of the bonds were not paid as the same matured, according to their terms?
>
> A. That was very largely responsible.
>
> Q. That is practically responsible, is it not, which really caused this condition?
>
> MR. BISSELL: We object to that as immaterial, calling for a conclusion, and hearsay.
>
> THE COURT: Objection sustained as leading."

ASSIGNMENT OF ERROR NO. 23

23. That the court erred in admitting and receiving in evidence plaintiff's Exhibit 16 over objection of the defendant, as follows:

> "MR. BISSELL: I offer them in evidence and offer to substitute in lieu thereof a copy of the American Falls Post, which was the official newspaper of the City of American Falls, which has each of the ordinances printed verbatim and in full.
>
> MR. STOUTEMYER: We object to that on the ground it has not been shown that the United States acquired title and that the attempted reassessment was void and already discharged in

this case, and therefore immaterial.

THE COURT: You do not object on the ground that they are not ordinances of the city, and passed by the city?

MR. STOUTEMYER: No.

THE COURT: Objection overruled."

ASSIGNMENT OF ERROR NO. 24

24. That the court erred in admitting and receiving into evidence plaintiff's Exhibit 4 over the objection of the defendant, as follows:

"MR. BISSELL: I offer this, which is certified by the abstractor, and made as such, showing the property taken over and inundated in district No. 9, together with the amount of the re-assessment under the ordinance.

MR. STOUTEMYER: I do not object on the ground that it is a copy, but we do object on the ground it is incompetent, irrelevant and immaterial, for a number of reasons, and including the fact that the attempted re-assessment occurred a number of years after the government purchased the property and is void for all purposes; for the further reason there is an entire lack of showing of the necessary facts under the state statute to authorize a re-assessment placed against privately owned property.

THE COURT: Objection overruled.

MR. BISSELL: Exhibit No. 4 in 743."

(Note: This exhibit now shows that the number "4" has been scratched out, and the exhibit marked "Changed. Exhibit 1 in 743.")

ASSIGNMENT OF ERROR NO. 25

25-a. That the court erred in sustaining an objection of the plaintiff to the testimony of F. A. Banks, a witness testifying on behalf of the defendant, as follows:

"Q. At the time that you took possession of this property in the name of the United States for reservoir purposes, did you claim title as the title of the United States?

A. I did.

MR. BISSELL: I object to that as incompetent, irrelevant and immaterial. He may state what the facts are.

THE COURT: Objection sustained.

MR. STOUTEMYER: We offer to prove by this witness that the time this property was taken by the government, for instance, it was taken under a claim that the United States was the owner and had title thereto. The United States did in fact have such title, and this witness never recognized the bondholders as the owner or having any interest in that property at the time it was taken for the government of the United States.

THE COURT: Objection sustained. Go ahead.

Q. Did you take this property as the property of the United States?

A. Yes, sir.

Q. Did you do so prior to the time it was flooded?

A. Prior.

Q. Did you recognize the bondholders as the owners thereof or any interest therein?

A. No, sir.

MR. BISSELL: I object to that and move to have the answer stricken. I object to it as immaterial.

THE COURT: Objection sustained."

25-b. That the court erred in sustaining the objection of the plaintiff to the testimony of witness F. A. Banks, testifying as follows:

"Q. Was that after an opinion had been rendered that the re-assessment was not a valid lien?

MR. BISSELL: I object to that as immaterial for the reason there is no showing here that anybody in authority or any court ever rendered such an opinion.

THE COURT: Objection sustained."

ASSIGNMENT OF ERROR NO. 26

26. That the court erred in overruling and denying the defendant's motion to correct the court's findings of fact to conform to the evidence, and in failing to so correct its findings.

H. E. RAY,

United States Attorney for the District of Idaho,

Attorney for Defendant Appellant.

Residence: Boise, Idaho.

B. E. STOUTEMYER,

Attorney for Defendant Appellant.

Residence: Portland, Oregon.

(Title of Court and Cause)

ORDER ALLOWING APPEAL

Filed Mar. 21, 1932

Upon the petition for appeal, accompanied by Assignments of Error, heretofore filed herein, it being made to appear that said petition should be allowed and that appeal is sought and brought up by direction of a department of the government of the United States, to-wit, the Department of Justice,

IT IS ORDERED That said petition for appeal be and hereby is granted and an appeal allowed, and the same shall operate as a supersedeas and no supersedeas, cost, or other bond on appeal shall be required.

Dated this 21st day of March, A. D. 1932.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

WRIT ON APPEAL

Filed Mar. 21, 1932

The President of the United States to the Honorable Judge of the District Court for the District of Idaho, Eastern Division, Greetings:

Because in the records and proceedings, as also in the rendition of judgment, which in the said District

Court before you between the J. K. Mullen Investment Company, a corporation, plaintiff in said court, and United States of America, defendant in said court, manifest error hath happened to the great damage of said appellant as by their complaint appears,

We being willing that error, if any hath happened, shall be duly corrected and full and speedy justice done to the party aforesaid in this behalf, duly command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the records and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California, within thirty days of this writ, in the said Circuit Court of Appeals to be then and there held, that the records and proceedings, aforesaid, being inspected, this said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

WITNESSETH: The Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States, this 21st day of March, A. D. 1932.

W. D. McREYNOLDS,
Clerk of the United States District Court, District of Idaho, Eastern Division.

Allowed by: CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause)

CITATION ON APPEAL

Filed Mar. 21, 1932

The President of the United States, to the J. K. Mullen Investment Company, a corporation, and to W. G. Bissell, its attorney, Greetings:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco in the State of California, within thirty days from the date hereof pursuant to Writ on Appeal regularly issued, and which is on file in the office of the Clerk of the District Court of the United States for the District of Idaho, Eastern Division, in an action pending in said court, wherein the United States of America is appellant, and the J. K. Mullen Investment Company, a corporation, is appellee, and to show cause, if any there be, why the judgment and proceedings in said writ mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESSETH: The Honorable Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 21st day of March, A. D. 1932.

CHARLES C. CAVANAH,
District Judge.

Attest:
W. D. McREYNOLDS, *Clerk.*

(Title of Court and Cause)

PRAECIPE

Filed Mar. 21, 1932

To W. D. McReynolds, Clerk of the above entitled Court:

Please prepare, certify, print, return, and transmit to the Circuit Court of Appeals for the Ninth Circuit of San Francisco, California, Transcript of the Record in the above entitled cause, including therein:

1. Paragraphs 5 and 9 Original Complaint; show filing date Amended Complaint.

2. Answer of United States of America to Amended Complaint.

3. Minutes of the court showing motions made during the trial, denials of the same and exceptions thereto.

4. Findings of Fact and Conclusions of Law by the court.

5. Judgment.

6. Petitions for and orders extending time for filing Bill of Exceptions by the defendant.

7. Bill of Exceptions.

8. Exceptions allowed by the court to Findings of Fact and Conclusions of Law.

9. Motion of defendant for modification of Bill of Exceptions and Conclusions of Law. Denial of the

same and exceptions.

10. Motion for Appeal.
11. Petition for Appeal.
12. Assignment of Errors.
13. Order Granting Appeal.
14. Writ on Appeal.
15. Citation on Appeal.
16. This Praecipe.

Omit printing title of court and cause and verification.

H. E. RAY,
United States Attorney for the District of Idaho.

(Title of Court and Cause)

SUPPLEMENTAL PRAECIPE

Filed Mar. 25, 1932

To W. D. McReynolds, Clerk of the above entitled Court:

To the original Praecipe in this case, please add the following, having in mind the numbers in the original Praecipe:

3½. Demurrer of the defendant to the Amended Complaint and order overruling the same.

4½. Defendant's motion to strike portions of plaintiff's Amended Complaint, and order overruling the same.

5½. Defendant's motion to make plaintiff's Amended Complaint more definite and certain, and order overruling same.

Dated this 25th day of March, A. D. 1932.

H. E. RAY,

U. S. Attorney for the District of Idaho.

(Title of Court and Cause)

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 173, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the Transcript of the Record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipes filed herein.

I further certify that the cost of the record herein amounts to the sum of $200.60 and that the same has been paid by the appellant.

Witness my hand and the seal of said court this 10th day of June, 1932.

(Seal) W. D. McREYNOLDS,

Clerk.

No. 6867

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE JOHN K. AND CATHERINE S. MULLEN BENEVOLENT CORPORATION, a corporation,

Plaintiff and Respondent,

vs.

THE UNITED STATES OF AMERICA,

Defendant and Appellant,

THE J. K. MULLEN INVESTMENT COMPANY, a corporation,

Plaintiff and Respondent,

vs.

THE UNITED STATES OF AMERICA,

Defendant and Appellant.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division

H. E. RAY,
United States Attorney for the District of Idaho.

W. H. LANGROISE,

SAM S. GRIFFIN,

RALPH R. BRESHEARS,
Assistant U. S. Attorneys for the District of Idaho,
Residence: Boise, Idaho.

B. E. STOUTEMYER,
District Counsel, Bureau of Reclamation,
Residence: Portland, Oregon.

Filed.., 1932

...., Clerk

FILED

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Reesidence: Boise, Idaho.

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District Counsel, Bureau of Reclamation,
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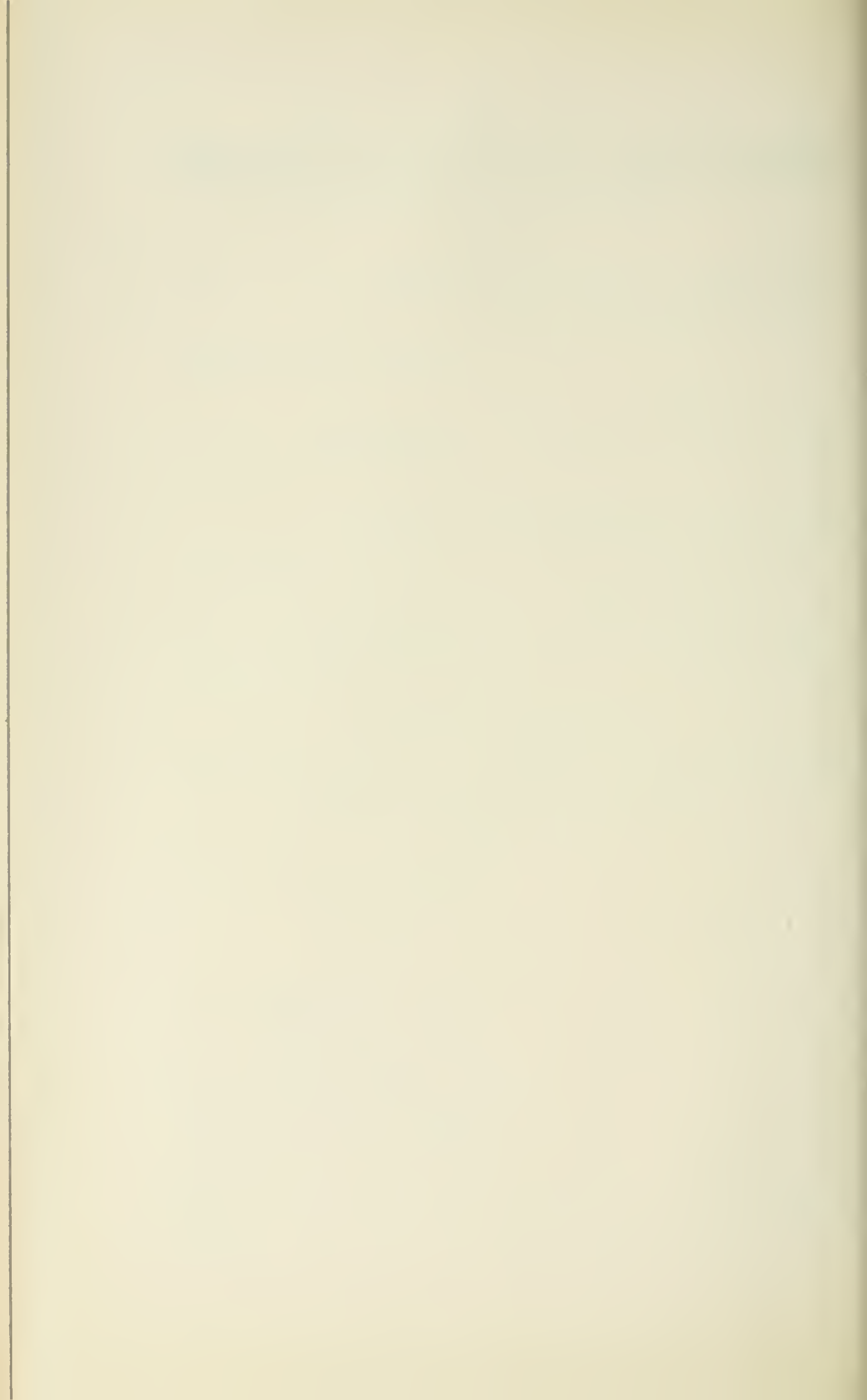
Filed..., 1932

...., Clerk



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*

STATEMENT OF FACTS

The two actions consolidated at the trial as well as for the purpose of this brief are brought under the provisions of the Tucker Act by the claimants of municipal improvement district bonds, to recover of the United States upon an implied contract the unpaid balance of the principal and interest upon those bonds.

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*—Page references are to transcript in Benevolent Corporation case, unless otherwise specified.

Case No. 731, which shall hereinafter for the sake of brevity be identified as the Benevolent Corporation case, involves bonds of improvement districts 1, 2, and 8 of American Falls, Idaho, all of the lots of which districts have been acquired by the United States for reservoir site purposes under the provisions of the act of Congress of June 17, 1902.

Case No. 743, which shall hereinafter, also for convenience sake, be referred to as the Investment Company case, involves bonds of improvement district No. 9, approximately 28 per cent of the lots of which were acquired by the United States and inundated as a part of the site of the American Falls Reservoir on Snake River (Pl. Ex. 13; Pl. Ex. 1 in case 743, pages 143, 144).

These improvement districts were created pursuant to Article 6, Title 32, Chapter 163 and Chapter 171, Idaho Compiled Statutes, in 1915 and 1916; numbers 1 and 2 for the construction of sewers and numbers 8 and 9 for sidewalks (Pl. Ex. 4-6, page 142 in case 731; Pl. Ex. 7 in the case). The improvements were made and the cost apportioned among the several lots in accordance with their respective benefits, and assessments were levied to conform to such apportionment. The assessments were made and levied immediately after the creation of the improvement districts, and bonds were issued and sold for improvement district number one in 1915 and for the other districts in 1916. (Page 142, Pl. Ex. 4-6; Pl. Ex. 7 in case 743).

The assessments, made for the payment of the costs of said improvements, were amortized as to principal and interest over a period of ten years ending coincident with the maturity of the said bonds (pages 141-3, Pl. Ex. 1-3, 13; Pl. Ex. 4 in case 743). These assessments upon the several lots later acquired by the United States for reservoir site purposes were paid in full (page 74, finding 22; 743 page 59, finding 16). Some of the lot owners within the several improvement districts paid the full assessment against their lots in advance as they were privileged to do under the provisions of Section 4019, Idaho Compiled Statutes (Pl. Ex. 13, page 130). Others permitted these assessments against their lots to become delinquent so that when the lots were purchased by the United States for purposes aforesaid, all delinquent as well as current and future assessments, together with penalties upon delinquencies, were paid, either by the owner, or the same withheld from the purchase price to the owner and paid by the United States to the city of American Falls whose duty it was to make collection of such assessments, safely keep, and pay over to the holders of bonds of the respective improvement districts. (Pages 109, 134; pg. 143, Pl. Ex. 13).

The United States commenced purchasing lots in said improvement districts for reservoir right of way purposes in 1920, and continued in that program through the following years and ending in 1926 (pages 131, 134, 135). In all purchase transactions with the individual lot owners all of the unpaid improvement district assess-

ments were paid to the city of American Falls those assessments not yet accruing being paid in advance, which involved the payment of interest as amortized in said assessments before the same had been earned (page 74 finding 22; pp. 130, 143 Pl. Ex. 13) (Case 743 p. 59 finding 16; pp. 114, 128, Pl. Ex. 13).

During said period of 1920 to 1926 the United States also acquired some of the lots in said improvement districts by lawsuits in exercise of the powers of eminent domain (pp. 131 and 134). In these actions the city of American Falls, Idaho, was made a party defendant, process regularly served thereupon and the value of the lots involved paid into court by the United States in pursuant of the judgment of the Court (cases 311-316 and 318-324, U. S. Dist. Court of Idaho, Eastern Div.).

During said period of 1920 to 1926 the United States also acquired some of the lots within said improvement district from Power County, Idaho, a municipal corporation in which said city of American Falls is situated, through tax title held by said County for failure of payment of State and County taxes upon the same (p. 143, Pl. Ex. 8). In that the purchase of lots in the improvement districts resulted in the payment of all assessments against the several lots together with penalties and interest upon delinquencies, the action of the United States complained of was beneficial rather than detrimental to the bondholders (page 113). The default upon payment of principal and interest upon bonds of district No. 9, which was only partially acquired and inundated as a

part of the American Falls reservoir site (approximately 28 per cent of the lots of the district) was much greater than the default in such payments upon bonds of districts Nos. 1, 2, and 8 which were acquired by the United States in toto (page 143, schedule D, Pl. Ex. 9; page 113).

In numerous sale and purchase transactions with the government the vendors were permitted to remove the buildings and other improvements upon the respective lots and move them outside of the reservoir site, which was done (page 123; Pl. Ex. 1, page 144); the work of tearing down and moving buildings from the reservoir site commencing in 1920 or 1921 and continuing through and including the year 1925.

When the United States commenced acquiring said lots for right of way purposes and until 1923, there was no question raised as to the sufficiency of the improvement district assessments levied against the several lots to retire the bonds with interest (page 134). In February 1923, a bank, in which such assessments paid were kept on deposit by the city of American Falls, failed (page 112) and its suspension precipitated an audit of the several improvement district funds by the city of American Falls (p. 143, Pl. Ex. 8), which disclosed the funds collected and those yet collectible were short some $20,000 in meeting the payment of bonds outstanding (p. 143 Pl. Ex. 8). The several items of the shortage are summarized in the report of the Auditor (Plaintiff's Exhibit 8).

Owing to threats of reassessment pursuant to section 4141, Idaho Compiled Statutes, to cover this shortage, the officers of the United States in charge of acquiring said reservoir right of way, in all right of way purchase transactions in 1925 and following, as a precaution, suspended payment of a part of the purchase price in an arbitrary amount pending the receipt of an opinion as to whether or not a proposed reassessment against the respective lots would constitute liens which the vendor was required to pay, when said arbitrary amounts so withheld were paid by the United States to the vendors in said right of way purchase transactions (pp. 134-5, 136-7).

Title to all of the lots within the improvement districts required for reservoir right of way purposes was acquired by the United States between 1920 and 1926 (page 131), and the officers of the United States in charge of the construction of said American Falls Reservoir have, ever since such acquisition, claimed fee simple absolute title in the United States and have never recognized any interest in said property of the plaintiffs in these actions.

The city of American Falls in 1928, by ordinance, purported to levy reassessments against the several lots within said improvement districts, pursuant to section 4141, Idaho Compiled Statutes, title to which lots had been acquired by the United States (page 119; page 144, Pl. Ex. 16).

Suit was commenced by the Benevolent Corporation in November 1929, and by the Investment Company in July, 1930 (page 7) (743, page 7).

The plaintiffs concede and the trial court found, that the original assessment has been paid in full (finding 22, page 74) (Finding 16, page 59 in case 743) and that the purported reassessment is void as against the United States. The findings of fact and conclusions of law and the judgment are based upon the theory that the original assessments, having proven insufficient to pay the bonds in full in principal and interest, the city of American Falls, as representing the bondholders, has a right to levy a reassessment pursuant to said Idaho state statute, in order to make up said deficits; that the action of the United States in acquiring title to the lots in said improvement districts, thus making the same tax exempt, has prevented the city from bringing into operation the Idaho state statute providing for a reassessment when through inadvertence the original assessment is insufficient to meet the cost of the improvement (Section 4141, Idaho Compiled Statutes). The Court concluded as a matter of law that such action on the part of officers of the United States has implied a contract on the part of the United States to pay the amount remaining unpaid upon outstanding improvement district bonds and that although the implied contract is based upon the acqusition of title in the United States (between 1920 and 1926), the causes of action did not accrue until the alleged tortious actions on the part of the officers of the United States in flooding the lots in said improvement districts in 1927 (conclusion 3, page 77).

Demurrers to the complaints were overruled as well as motions to strike out and make more definite and certain (page 43; 734, page 34).

At the trial, ownership of the bonds in the plaintiffs as a basis for their respective actions was shown upon hearsay testimony only (pp. 82-98). When plaintiffs and respondent were claimed to have acquired the bonds, in question, was not shown.

CHRONOLOGY

	Mullen Benevolent Corporation v. United States Case No. 731						Mullen Inv. Co. v. U. S. Case No. 743	
	Local Impr. Dist. No. 1		Local Impr. Dist. No. 2		Local Impr. Dist. No. 8		Local Impr. Dist. No. 9	
	Date	Ref *	Date	Ref *	Date	Ref *	Date	Ref **
Creation of district	1915 (Mar)	60	1916 (June)	63	1916 (June)	66	1916 (June)	50
Levy of assessments	1915 (July)	61	1916 (Aug)	64	1916 (Sept)	67	1916 (Sept)	51
Payment of entire assessments upon some lots	1915	130	1916	130	1916	130	1916	114
Issue and sale of bonds	1915 (July)	62	1916 (Dec)	65	1916 (Dec)	69	1916 (Sept)	52
Purchase by U. S. of first property in res. site	1920	134	1920	134	1920	134	1920	118
Condemnation by U. S. of property in res. site	1921	131	1921	131	1921	131	1921	115
Purchase by U. S. of property in reservoir site and payment of all district assessments by the vendor or the United States	1920-1926	74 109	1920-1926	74 109	1920-1926	74 109	1920-1926	59 94
Removal of buildings on all lots within the reservoir site	1920-1926	123	1920-1926	123	1920-1926	123	1920-1926	108
Failure of First National Bank of American Falls, with funds of dist. on deposit	1923 (Feb)	112	1923 (Feb)	112	1923 (Feb)	112	1923 (Feb)	97
Maturity of bonds	1925 (July)	62	1926 (Aug)	65	1926 (Sept)	68	1926 (Sept)	52
Organization of plaintiff corporation	1925					59	not shown	
Flooding of parts of districts by partial filling of reservoir	1925-1926	131	1925-1926	131	1925-1926	131	1925-1926	115
Filling of reservoir to capacity	1927	131	1927	131	1927	131	1927	115
Enactment by City of ordinances purporting to reassess all lots to make up balance due upon bonds, including lots in which title had passed to U. S. by deed, condemnation decree and deed by holders of tax deed	1928	69	1928	69	1928	69	1928	109
Suit commenced	1929 (Nov)	73	1929 (Nov)	73	1929 (Nov)	73	1930 (July)	7

*Reference to page of transcript, Case No. 731. **Reference to page of transcript, Case No. 743.

The Benevolent Corporation was not organized until 1925 (page 96).

The defendants moved for non-suit upon the grounds as specified and the motion was overruled (pp. 130, 139; case 743 pages 122, 123). The cases were decided for the plaintiffs. Findings of Fact and Conclusions of Law were made by the Court (pp. 59-78; 743, pp. 48-63); moved to be corrected by the defendant (p. 149; 743 page 133); the motion overruled and judgment entered upon the facts thus found, giving judgment in favor of the Benevolent Corporation for $8,104.79 and costs (page 78) and in favor of the Investment Company for $388.48 and costs (743, page 63), both as against the United States.

Exceptions were taken to the rulings of the Court as required, a bill of exceptions has been certified to the Court (p. 145; 743, page 129), and an appeal has been taken to this court assigning error in the rulings of the trial court (pp. 159-189; case 743, pp. 141-167) grouped, for sake of convenience, in argument as hereinafter set out.

ANALYSIS OF PLEADINGS

The complaints as amended allege the creation of the several improvement districts (paragraphs 5, 9, 13 of pp. 13, 20, 23, respectively; and par. 5, page 12 in case 743), the levy of assessments against the lots of said districts for payment of the cost of the improvement, with interest

over a period of ten years (pars. 5, 9, 13, pages 13, 20, and 23, respectively; par. 5, page 12 in 743), the issuance of bonds of the several districts as per sample set out (pars. 6, 10, 14, pp. 15, 22, 25, respectively; par. 6, page 14 in case 743), and the purchase of a part thereof (Pl. Ex. 1-4, pages 141-2) by one J. K. Mullen and a transfer "thereafter" to the plaintiffs (pars. 7, 11, 15 pgs. 16, 22, and 25, respectively). It is then alleged that through mistake and inadvertence of the city officers in making the original levy of assessments, the same were not sufficient to pay the bonds and interest (par. 17, page 26-27), that on or about January 1, 1927 the United States under authority of law and acting through the authorized agents of the Bureau of Reclamation, Department of the Interior, without proceeding in eminent domain against the plaintiffs and aware of the outstanding unpaid bonds and the insufficiency of the original assessments to pay the same, took exclusive possession, title and control of the lots of the several improvement districts (except district No. 9, and in that district approximately 28% of the lots thereof) for a public purpose, as site for the American Falls Reservoir (par. 19, pages 28-29) and sold, destroyed or removed the improvements on said lots and inundated the lots and deprived the plaintiffs of their property and the one and only method of enforcing payment of the bonds and the reassessment later made (par. 19, page 29); that on July 3, 1928, while the bonds were owned and held by the plaintiff and were due, owing and unpaid because of the mistake or inadvertence in the fail-

ure in making the original levy, to levy a sufficient amount therefor, and to comply with its statutory duty the city of American Falls enacted its ordinances 122, 123, 124 (Pl. Ex. 16, page 144) providing for a reassessment upon all taxable property in the districts and directing the making and filing of a reassessment roll of the taxable property within the districts and reassessing the cost of the benefits against the taxable property of the districts (par. 17, pages 26-27); that reassessment rolls were duly certified and filed and notice thereof given according to law (par. 17, page 27); that the property so taken by the United States was at the time of taking and destruction of value greatly exceeding the claim of plaintiffs (par. 19, pages 29-30) and that the United States is indebted to the plaintiffs the balance unpaid upon said bonds with interest (par. 20, page 30). The defendants demurred (page 31) to the Complaints as amended, moved to strike therefrom, and to make more definite and certain (pages 38 and 41-43), and upon denial by the Court (page 43) answered, making the general issue and alleging five additional separate defenses:

(1) The payment of the original assessment levied against the lots of the several districts and their loss by reason of acts of the city (page 51);

(2) Lack of jurisdiction by reason of no contract, express or implied. The United States when acquiring the lots of the several districts took the same under claim of

title in the United States and has not recognized the plaintiffs as the owners thereof or having any interest therein (p. 54);

(3) There was no implied contract on the part of the United States because the action of the United States in acquiring title to the lots in the several districts was beneficial to the bondholders; if any injury was suffered by the plaintiffs the same was too remote and consequential to make the taking an implied contract (page 55);

(4) That the plaintiff had acquired the bonds after any injury thereto may have occurred by action of the United States in acquiring the lots of the several districts for reservoir right of way purposes (pp. 56-57);

(5) That the plaintiffs' actions are barred by the Idaho statute of limitations (p. 57).

BRIEF AND ARGUMENT

We shall preliminarily discuss jurisdiction of the court to hear these cases and then follow with a discussion of the theory of the plaintiff and its relation to the evidence and then discuss other assignments of error.

The lack of jurisdiction in the trial court to hear and determine the purported action against the United States appears from the complaints and is not supplied by the proof. Absence of jurisdiction is assigned in assignments of error 1 (a) to 1 (e), inclusive, 2, 11, 25 and 26. (Pages 159-161; 164, 187-189).

It is the duty of the court *sua sponte* to dismiss where the record shows lack of jurisdiction or fails affirmatively to show jurisdiction. *Northern Pacific Steamship Company v. Soley,* 257 U. S. 216; *Morris v. Gilmer,* 129 U. S. 315, and authorities cited.

The United States can be sued for such causes and in such courts only as they have, by act of Congress, permitted. *United States v. Gleeson,* 124 U. S. 255.

The permissive act here involved is the Tucker Act (Act of March 3, 1887; United States Code, Title 28, Paragraph 41, Subdivision 20), and the court has no jurisdiction as against the United States beyond the grant and limitations of this act.

Suits against the United States for compensation for taking of private property, as here alleged, are not founded upon the Constitution, but are based on an implied contract to pay just compensation for the property taken, and the jurisdiction of the court to entertain such suits derives from that clause of the Tucker Act conferring jurisdiction, concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars, founded "upon any contract, express or implied, with the government of the United States." Unless there is such contract, the court is without jurisdiction to entertain the suit *Hurley v. Kincaid,* 285 U. S. 95; *United States v. Lynah,* 188 U. S. 445; *United States v. Cress,* 243 U. S. 316; *United States v. Minnesota Mutual Investment Company,* 271 U. S. 212; *United States v. North American Transport & Trading Company,* 253 U. S. 330, 335.

In order to give rise to such implied contract, there must be a direct and actual taking of the property of plaintiff for the use or purposes of the United States, with intent and authority to take, and under circumstances from which an intent to pay for the property so taken may be inferred in fact.

None of these conditions are met in the instant cases, and hence no contract can be implied, upon which jurisdiction may be predicated.

The Tucker Act under the provisions of which these actions are brought is a grant of right which is wholly measured by the terms of the act. The provisions thereof which limit the actions to those upon contract, express or implied and impose a time limit of 6 years in which the right may be enjoyed, are not statutes of limitation, in the ordinary understanding of the word, but are the very genesis of the right, fixing the limit of operation both in subject matter and point of time.

Chaps 2 and 7, Title 28, U. S. C.

Champagnie Generale Tr. v. U. S., 52 Fed. (2) 1053 and U. S. Supreme Court cases therein cited.

Finn v. U. S., 123 U. S. 227.

Carpenter v. U. S., 56 Fed. (2) 828.

The six-year limitation of the Tucker Act is jurisdictional; *Phillips v. Grand Trunk,* 236 U. S. 662, 666; *Finn v. United States*, 123 U. S. 227; *United States v. Wardwell,* 172 *U. S.*, 48, 52; *Kendall v. United States*, 14 C.

Cls. 122; *Baltimore & Ohio Railway v. United States,* 34 C. Cls. 484, 508. Plaintiff's right of action, if any, arose at the time the United States acquired the lands in question by purchase or condemnation. If plaintiffs lost any right it was when the United States acquired the property. The flooding of the land did not affect plaintiffs' rights in the slightest after their acquisition by the United States.

The record in the cases at bar is undisputed, that the government acquired some of the lots in the several improvement districts as early as 1920, and a large part of the lots by purchase and condemnation between 1920 and 1923 (Testimony of Mr. Banks, pp. 131, 134-135). If we assume that there existed an implied contract as the judgment of the lower court holds, the plaintiffs are required to show that the right to sue upon the contract accrued within six years of the bringing of the action or that the United States acquired all of the lots within the improvement districts within six years of the commencement of their actions. (November, 1929 and July 1930). The pleadings and proof wholly fail to show this fact, indispensable to the jurisdiction of the trial court.

Any obligation of the United States in these cases is, necessarily, upon claim of an implied contract. Implied contracts in fact do not arise from the denials and contentions of parties but from their common understanding in the ordinary course of business whereby mutual intent to contract without formal words therefor is shown.

Tempel v. U. S., 248 U. S. 121;

Hill v. U. S., 149 U. S. 593;
Knapp v. U. S., (1911) 46 Ct. Cl. 601;
B. & O. Ry. Co. v. U. S., 261 U. S. 592-599.

The lots in the several improvement districts were acquired by the United States by purchase and by suits in exercise of the power of eminent domain.

The United States did not take plaintiffs' bonds, nor take for its use any right which plaintiffs may have had under these bonds.

The cases are closely analagous to that of *Omnia Company v. United States*, 261 U. S., 502. In that case plaintiff had a contract with the Alleghany Steel Company, under which the latter undertook to furnish plaintiff with a large quantity of steel plates. Thereafter, the United States requisitioned the entire product of the Steel Company's plants, and thereby rendered impossible the performance, by the Steel Company, of its contract with plaintiff. Plaintiff brought suit under the Tucket Act for a "taking" by the United States of its contract with the Steel Company. The court held, however, that while a contract was property, which, when taken for public use, must be paid for by the government, that there was no taking by the government of plaintiffs' contract; that the United States acquired no right under the contract, and that plaintiff was merely "frustrated" by the government of the United States in enforcing its contract against the Steel Company, and that such action did not give rise to a cause of action against the United States.

The court states: "Plainly, here there was no acquisition of the obligation or the right to enforce it," and, further, "As a result of this lawful governmental action, the performance of the contract was rendered impossible. It was not appropriated but ended."

So here, the United States did not take plaintiffs' bonds or did not acquire any right under them. The United States "took" only the land which they acquired by lawful purchase or condemnation. If plaintiff lost anything, it was merely a contingent and conditional right of reassessment or further assessment, which might have existed in favor of plaintiffs if the land had remained in private hands. The government, however, did not take this right. It was merely "ended", as stated by the Supreme Court, as an incidental result of the government's acquisition of the lands.

The officers in charge of the acquisition of the property as a site for the American Falls reservoir took title thereto in the name of the United States and have ever since claimed ownership and title exclusive of any interest claimed by the plaintiffs and without recognition of their claim.

The plaintiffs complaint fails to supply the necessary jurisdictional allegation that the government officers recognized their claim of right. The proof is undisputed.

Witness Banks (construction engineer in charge of construction of American Falls Dam for the United States) testified:

"At the time of taking possession of those lots as engineer in charge of construction, I claimed title to said property as the title of the United States prior to the time it was flooded, and did not recognize the bondholders of special improvement district bonds as the owners of said lots or of any interest therein.

I have never stated that the United States withheld from the purchase price due to lot owners any money for payment of bonds, nor have any of my subordinates been authorized to make any such statement, or made any such in my presence. There was no money withheld from the purchase price due vendors or lot owners for the payment of any bonds. On some of the lot purchase transactions a sum of money was withheld from said lot vendors, temporarily, pending my receipt of a legal opinion as to whether or not a proposed reassessment against lots within said improvement districts would constitute such a valid lien which our land purchase contracts authorized us to pay and deduct from the purchase price. The money temporarily suspended was paid to the land owners." Tr. 132.

It is true the Court found (finding 23) that

"the officials of the United States in charge of the property took the same as the property of the private individuals and at the time of taking recognized the rights of the plaintiff * * * *". (Page 75).

but the foregoing testimony negatives any such finding which has no support in the testimony of any of the witnesses who testified at the trial.

In the case of *Tempel v. United States, supra,* the United States Supreme Court held:

> "The fiindings of fact made by the trial court (amplified by the reports of the Secretary of War, of which we take judicial notice,) show that the government claimed at the time of the alleged taking, and now claims, that it already possessed, when it made its excavation in 1909, the property right actually in question. It is unnecessary to determine whether this claim of the government is well founded. The mere fact that the government then claimed and now claims title in itself, and that it denies title in the plaintiff, prevents the court from assuming jurisdiction of the controversy. The law cannot imply a promise by the government to pay for a right over, or interest in, land, which right or interest the government claimed and claims it possessed before it utilized the same. If the government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort; and for such, the Tucker Act affords no remedy. *Hill v. United States* 149 U. S. 593, which, both in its pleadings and its facts, bears a strong resemblance to the case at bar, is conclusive on this point. See also *Schillinger v. United States,* 155 U. S. 163. The case at bar is entirely unlike both the

Lynah case and the Cress case. In neither of those cases does it appear that, at the time of taking, there was any claim by the government of a right to invade the property in question without the payment of compensation."

248 U. S. 121, at page 130.

See also:

U. S. v. Minnesota Mut. Invest. Co., 271 U. S. 212-218;

B. & O. Railroad Co. v. U. S., 261 U. S. 385.

At the trial, the plaintiffs disclaimed any right to have the city reassess lots of the several improvement districts, since title was in the United States at the time the purported reassessment was made. The reassessment in 1928, after the United States had acquired title to all of the lots within the improvement districts, was set up to show that the plaintiffs attempted to avail themselves of every remedy, but are without a remedy, and their security has been rendered valueless by reason of certain acts on the part of the officers of the government (see findings 18, 19, 20, 22, 23, 24 at pages 70, 71, 72, 74 and 75). The action complained of is the acquisition of the lots in the several improvement districts, in the name of the United States, taking them outside of the power of local taxation including the power to reassess the lots as the local statutes under some circumstances permit and that a contract to pay the bonds is thus implied.

The action of the officers of the United States in placing property beyond the local taxing power, in pursuance of an admittedly proper governmental function does not imply a contract on the part of the United States to pay any tax which otherwise may have been levied upon that property. If any injury resulted to the plaintiff the same is too remote and consequential.

Alabama v. U. S., 282 U. S., 502-507;
Sanquinetti v. U. S., 264 U. S., 146-150;
Bedford v. U. S., 192 U. S., 217, 224;
Keokuck etc. Bridge Co. v. U. S., 260 U. S., 125, 127;
John Horstmann Co. v. U. S., 257 U. S., 138.

That the government is not liable for incidental or consequential damage resulting from governmental action, see also *Willink v. United States,* 240 U. S. 572; *Gibson v. United States,* 166 U. S. 269; *Scranton v. Wheeler,* 179 U. S. 141; *Jackson v. United States,* 230 U. S. 1; *Mitchell v. United States,* 267 U. S. 341; *Bothwell v. United States,* 254 U. S. 231.

It was Alabama's claim, in the case above cited, that by the sale of power generated at Muscle Shoals the United States, by implication, agreed to pay a tax which might have been levied if the power plant had been privately owned. The Supreme Court held the claim was not recognized under the Tucker Act, and the court therefore without jurisdiction.

> "The contract to be recovered upon under Sec. 145, Judicial Code, must be an actual one, and, if implied,

must be implied in fact, not merely implied by fiction, or as it is said, by law. *Baltimore & Ohio R. Co., v. United States*, 261 U. S. 592, 597, * * * Levying a tax does not create a contract. It is a unilateral act of superior power, not depending for its effect upon concurrence of the party taxed." 282 U. S. 502.

Consistency would require the court to recognize an identical claim of any general bondholder or warrant holder of the City or County or any municipality in which the reservoir site was situated, or of the taxpayers therein who might readily complain that the placing of so large a body of land, as the reservoir site, beyond the power of taxation lessened the security of the bond and warrant holders and increased the burden of the owner of taxable property within the municipality.

But the testimony does not bear out any claim of injury by action of the United States but rather that the action of the United States, in purchasing the lots of the several improvement districts, resulted beneficially to the bondholders in the payment of delinquent assessments which otherwise would have been lost to the bondholders.

All of improvement districts 1, 2 and 8 (Benevolent Corporation case) were acquired by the government. But 28 per cent of the lots in improvement district 9 (Mullen Investment Company case) were acquired by the United States P. 1 Ex. 13).

There is a glaring inequality in the plaintiffs claim of

tion of the bonds would have been paid if the United States had not purchased the property. To the contrary, it has been shown that there was a larger proportion of the bonds defaulted in the improvement district where the United States acquired only a small proportion of the lots and nearly all the lots remained in private ownership than in any of the districts where the United States acquired all the lots. The action of the United States was on the whole beneficial to the bond holders and resulted in the payment of a larger proportion of the bonds than would have been paid if the United States had not purchased the property. The reason why this is true is explained by the plaintiffs accountant, Mr. Bowen, as follows:

> "A substantially greater portion of bonds in District No. 9 (case No. 743) remain outstanding and unpaid than in any of the other districts, and in that district a substantial part of the original assessment has never been paid upon lots outside the reservoir site, which is not true in those districts (Nos. 1, 2, and 8) where the United States purchased all of the lots." (Page 113).
>
> "Many of the lot owners, prior to the time the United States purchased the property, allowed their taxes to become delinquent until the United States purchased, when they paid up not only their assessments but in addition the penalties and interest on delinquent taxes, which accounts for this excess collection." (p. 109) (Pl. Ex. 9, page 143).

It is plain that if the bondholders suffered any disadvantage on account of the fact that the property purchased by the United States could not be reassessed after the United States had acquired title thereto, it was a disadvantage which was more than offset by advantages of other kinds, so that the net result was favorable to the bondholders as above set out.

The original assessment, in many cases with penalties and interest added, was paid in full on the property purchased by the United States, but many of the lots outside of the reservoir site which were not purchased by the United States were allowed to go to tax sale and the original assessment was never paid, with the result that we find the largest default in bond payments where the United States did not purchase the property, and the smallest proportion default in bond payment where all the property was purchased by the United States.

The flooding of the lots upon completion of the reservoir in 1926 and 1927, if actionable at all, is in tort, for the recovery on account of which the Tucker Act gives no right of suit against the United States. Such action (the flooding of the property) on the part of the United States did not prevent the operation of the state law permitting reassessments.

The United States paid in full, all taxes and assessments which had been levied on the property at the time the United States acquired it, and is not liable for any taxes and assessments which were not levied at such time.

The action complained of is the taking of the property, which occurred when deed was delivered to United States or summons in condemnation issued.

Heine v. Commissioners, 86 U. S. 655;
Lyon v. Alley, 130 U. S. 177;
U. S. v. City of Buffalo, 54 Fed. (2) 471;
U. S. v. Pierce County, 193 Fed. 529;
Bannon v. Burnes, 39 Fed. 892;
Wulzen v. Board of Supervisors, 35 Pac. 353 (Cal);
Providence R. R. Co., Petitioner, 17 R. I., 324;
Lewis on Eminent Domain, 3rd Ed. Par. 443;
Weiser Valley L. & W. Co. v. Ryan, 190 Fed. 417;
Brown v. U. S., 263 U. S. 78.

The principle involved in the foregoing cases is stated in the opinion in United States v. Pierce Co., as follows:

> "In case, however, the tax was imposed after the acquisition of the property by the United States, it is wholly null and void. I think it was so imposed. Consideration of numerous sections of the taxation law of the State of Washington and of the general scheme embodied in those sections makes it plain that March 1st is fixed as the arbitrary date for the beginning of the taxation year. At that time the assessor and his deputies begin their task of valuing all the property in the county, fixing the valuation as of that date. The actual valuation necessarily consumes the work of a number of men for several months. On completion of the assessment it is sub-

mitted to the board of equalization, which meets in August, and it is subject to entire revision by that body. Still later the corporate authorities of the several cities, towns, and school districts determine upon the amount of revenue needed for their respective purposes, and in October the board of county commissioners, and the other authorities on whom the statute has conferred the taxing power, levy the tax. While I entertain no doubt that it is within the power of the state to treat the entire taxation proceeding as having been taken at some definite date, so far as concerns the general mass of property (as held by the Supreme Court of Minnesota in *State v. Northwestern Tel. Exchange Co.*, 80 Minn. 17, 82 N. W. 1090), a different rule must apply to property which, while the taxation proceeding is still incomplete, passes under the dominion and exclusive jurisdiction of the United States. The transfer of title to the United States operates to withdraw the property from all the effects of subsequent state action and subjects it to the sole jurisdiction of the United States. As to such property all incomplete state proceedings must fall. To hold otherwise would be to hold that boards of equalization, boards of county commissioners, and city councils can meet and deliberate as to the valuation for taxation purposes of property over which the government of the United States is vested with the power of exercising 'exclusive legislation in all cases whatsoever,' and

can by their votes and proceedings determine how large or how small a tax such property shall be required to pay. It is too plain for argument that, without an order levying the tax and fixing its rate, no tax could be enforced; and it is equally plain in this case that such order was made several months after the United States acquired this property. That order could not operate against property that had passed under the exclusive jurisdiction of the United States. As to such property no tax has been levied."

193 Fed. 529 at page 532.

This case was followed by the Circuit Court of Appeals, 2nd Circuit, in the very recent case of *United States v. City of Buffalo,* (*supra*).

Upon cross-examination Mr. F. A. Banks, government engineer in charge of construction of American Falls Dam, testified as follows:

"CROSS EXAMINATION

BY MR. BISSELL:

Q. Mr. Banks, you were the gentleman in whose name all of these contracts were purchased and taken, were you not?

A. Most of them, yes.

Q. And you began to make those contracts for the purchase of property down there as early as 1920, did you not?

A. Yes, sir.

Q. And there were a large number of those contracts executed in 1920?

A. Yes, I think so."

The assessments against the lots for the cost of improvements and payment of the bonds were paid in full (Testimony of Mr. Bowen, page 109; Finding 22, page 74). The sole interest in the lots claimed by the bondholders was the right to have the lots re-assessed. This right was alleged to have been destroyed by the United States in taking the lots for a governmental purpose, thus rendering them immune from future tax levies, including the reassessments made by the city in 1928. The flooding of the lots did not make them tax exempt. The plaintiffs' cause of action, if any, accrued when the United States acquired title to the several lots in exercise of eminent domain either by purchase or suit, for it was the conveyance of the lots to the United States and not the subsequent flooding thereof that removed the property from the taxing power and destroyed the remedy of re-assessment. It is the destruction of the remedy of reassessment which is the basis of this action.

The trial court used the action of the officers of the United States in taking title to the lots in the name of the government as a basis for the purported implied contract and the alleged tortious action of flooding the lots as fixing the time of accrual of the action. If the lots after purchase by the United States had never been

flooded, the effect so far as the power of reassessment is concerned would have been the same. The flooding did not affect in any way the payment of the bonds.

Suits against the United States under the provisions of the Tucker Act do not admit of any greater right than a claimant has against an individual. The judgment of the trial court under the pleadings and proof herein would enlarge the jurisdiction of Court of Claims to comprehend actions which would not lie against an individual. If a private individual were defendant here,

(a) the plaintiffs' sole remedy would be in foreclosure;

(b) the market value of the property, and not the amount due upon the bonds, would be the limit of recovery;

(c) the lots of the several improvement districts would not be subject to reassessment under state law.

U. S. Code Annotated, Title 28, Judicial Code,, Sec. 41, Sub. 20.

Sioux City & St. P. R. R. Co. v. U. S., 36 Fed. 610.

Smoot's case, 15 Wall. 36, 45.

Gilbert v. United States, 8 Wall. 358, 362; 19 L. ed. 303.

Idaho Comp. Statutes, Secs. 4007, 4017 and 4023.

Bosworth v. Anderson, 47 Ida. 697, 280 Pac. 227.

New First Nat. Bank v. Weiser, 30 Ida. 15, 166 Pac. 213.

Page & Jones on Taxation by Assessment, Sec. 958.
Oklahoma City v. Eastland, 274 Pac. 651.
School Dist. No. 1 *v. City of Helena,* 287 Pac. 164.
Oklahoma City v. Orthwein, 258 Fed. 190.
Idaho Compiled Statutes, Sec. 4141.
Lucas v. City of Nampa (*Idaho*), 37 Ida. 763; 219 Pac. 596.

Section 41, subdivision 20, Title 28 of the Judicial Code (U. S. C. A.) provides in part, that the trial court should have jurisdiction, concurrent with the Court of Claims, of claims

> "upon any contract, express or implied, with the government of the United States * * * in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable * * * ."

Any action which overruns the measure thus determined is at best (as was held in the case of *United States v. Minnesota Mut. Invest. Co., supra,* a contract implied in law and not in fact and not therefore such a contract as is actionable under the provisions of the Tucker Act.

A contract implied in law by legal fiction in the nature of a *quasi*-contract, is not suffcient to confer jurisdiction against the United States under the Tucker Act; the contract must be one "*implied in fact*, founded upon a meeting of minds, which, although not embodied in an express contract, is inferred as a fact, from the conduct of the

parties showing in the light of surrounding circumstances their tacit understanding." *Baltimore & Ohio Railroad Company v. United States,* 261 U. S. 592, 597; see also *Alabama v. United States,* 282 U. S. 502, 505; *United States v. Minnesota Mutual Investment Company,* 271 U. S. 212; *Tempel v. United States,* 248 U. S. 121.

The United States paid to the owners of the property, by purchase or in condemnation proceedings, the full value of the property, which was taken, and paid all taxes and liens of every nature which then existed against said property. Under these circumstances it would be absurb to say that the United States agreed with plaintiffs to pay them a further sum over and above the value of the property which was taken. Such implication is directly negatived by all the facts and the testimony in the case.

In *Ball Engineering Company v. White,* 250 U. S. 46, 57, it is held that no contract can be implied where the government took property with the intent not to pay, and that liability in such case, if any, is in tort, for which the United States has not consented to be sued. See also on this point *Hill v. United States,* 149 U. S. 595; *Tempel v. United States,* 248 U. S. 121, 130; *Journal etc. Company v. United States,* 254 U. S. 581, 585; *United States v. Holland America Lijn,* 254 U. S. 148.

For the sake of argument assume that an improvement district bondholder has an interest in the lots improved, such as is not foreclosed on payment of the assessment

levied upon a particular lot. His remedy against a private individual in ownership of the lot is clear.

Section 4017, Idaho Compiled Statutes, in part, provides:

> "4017. When district bonds are issued under this article for improvements, the cost of which is by law charged by special assessment against specific property, the mayor and council, or trustees, or other authorized officer, board or body, shall levy special assessments each year sufficient to redeem the instalment of such bonds next thereafter maturing, but in computing the amount of special assessments to be levied against each piece of property liable therefor, the interest due on said bonds at the maturity of the next instalment shall be included. *Such assessments shall be made upon the property chargeable for the cost of such improvements, respectively, and shall be levied and collected in the same manner as may be provided by law for the levy and collection of special assessments for such improvements where no bonds are issued, except as otherwise provided by this section.* * * * ." (Italics supplied).

The manner provided by law for the collection of special assessments where bonds are not issued, as referred to in the section of the statute just quoted, is defined by Sec. 4007, Idaho Compiled Statutes, reading:

> "4007. Whenever any expense or cost of work shall have been assessed on any land the amount of

said expenses shall become a lien upon said lands, which shall take precedence of all other liens, *any which may be foreclosed in accordance with the provisions of the Code of Civil Procedure.*

Such suit shall be in the name of the city of . . . . (naming it) as plaintiff, and in any such proceedings where the court trying the same shall be satisfied that the work has been done or material furnished, which, according to the true intent of this article, would be properly chargeable upon the lots or lands through or by which the street, alley or highway improved or repaired may pass, a recovery shall be permitted, or a charge enforced to the extent of the proper proportion of the value of the work or material which would be chargeable on such lot or land notwithstanding any informalities, irregularities or defects in any of the proceedings of such municipal corporation or any of its officers." (Italics supplied).

Section 4023 of Idaho Compiled Statutes, provides in part as follows:

"4023. *Bondholders' rights and remedies.* * * * And if the municipality shall fail, neglect or refuse to pay said bonds or to promptly collect any of such assessments when due, the owner of any such bonds may proceed in his own name *to collect such assessments and foreclose any lien thereon in any court of competent jurisdiction,* and shall recover, in addition to the amount of such bonds and interest there-

on, 5 per centum, together with the costs of such suit including a reasonable sum for attorney's fees.

Any number of the holders of such bonds for any single improvement may join as plaintiff, and any number of holders of the property on which the same are a lien may be joined as defendants in such suit." (Italics supplied).

The Supreme Court of the State of Idaho has left no room for doubt as to the proper construction of the sections quoted by its decision in the comparatively early case of *New First National Bank v. Weiser, supra*, wherein that Court expressly stated in so many words:

> "The bondholders must pursue the remedy provided by statute." 30 Ida. 15, 166 Pac. 213.

and in the recent case of *Bosworth v. Anderson, supra*, in which the opinion in part reads as follows:

> "This assessment became the basis, as to the individual property owner, of the charge on his land indicative of the benefits accruing to him, and fixed the amount of the lien against his land and it would have to be paid on such unit to redeem his land from the obligation of the bonds. This unit as to the bondholders contained the definition of their security because, while the bonds were obligations secured by all the lands in the district, *in order to enforce their security, foreclosure would be necessary against each particular piece of land in the district*

to the amount of liability thereon, theretofore determined by the only body authorized to act, namely, the city council. Therefore, for the life of the bond issue, these units of assessment were fixed and could not be changed. C. S. Sec. 4017." (Italics supplied). 47 Ida. 697; 280 Pac. 227.

If the sole remedy of a bondholder, as against a private individual in ownership of any of the lots of the improvement district, is foreclosure, as directed by the laws under which such districts are created, any additional remedy of which the plaintiffs seek to avail themselves as against the United States in ownership of the same lots is not within the purview of the Tucker Act and the Court requested to adjudge the remedy is without jurisdiction.

Furthermore, the trial court entered a personal judgment from which private individuals, owners of improvement district lots, are absolved. Even mortgagors of real property under foreclosure are not subject to a personal liability until the security is exhausted, under the laws of the State of Idaho, and the purchaser of mortgaged property is not personally liable unless he agrees to assume such liability. Obviously the holder of an improvement district bond would have no greater right against the owner of a lot in an improvement district than would a mortgagee against a mortgagor, and under the laws of most of the states, including Idaho, a decree of foreclosure of a mortgage is in no sense a personal judgment,

and a personal judgment cannot be entered until after foreclosure sale.

Perkins v. Bundy, 42 Ida. 560, 247 Pac. 571.

If a private individual were defendant as the present owner of any of the lots within the several improvement districts, or if the United States, being the owner, were suable in a court of law, equity or admiralty without its consent as expressed in the Tucker Act, under the most favorable circumstances to the plaintiffs the market value of the several lots minus the aggregate of liens and encumbrances superior to the lien of assessments for costs of improvements would constitute the maximum for which the plaintiffs could make claim. The complaint of the plaintiffs as amended contains no allegation that the property taken by the United States is of a value in excess of all liens of precedence or of equal priority to plaintiffs' alleged liens. The proof is also without any reference to value, except in the testimony of witness Sparks, that "the uninundated portion of District No. 2 (Benevolent Corporation case) would be worthless for residence or business purposes." (page 126). The trial court's finding (Finding 19 in the Benevolent case) finds "that the property so taken by flooding, as aforesaid, by the defendant, was, at the time of taking, of a value greatly in excess of the claim of the plaintiff." (pages 71-72), but the finding is wholly without support. T. C. Sparks is the only witness who displayed any qualifications as a witness as to values or gave any testimony as to values, and the whole of such testimony is as follows:

> "* * * I have been an abstractor for sixteen years in American Falls and while not engaged in the general real estate business, I have handled property for non-residents on some occasions; I have become acquainted with the value and location of various properties in American Falls and in my opinion the uninundated portion of district No. 2 would be worthless for residence or business purposes." (Tr., page 126).

The trial court having thus lacked jurisdiction to hear the cause under the pleadings and to determine the action favorably to the plaintiffs if the action were against an individual without any proof of the value of the property involved, the Tucker Act does not enlarge the court's jurisdiction in actions against the United States.

In another particular there is disclosed a total lack of jurisdiction in the trial court. The plaintiffs' complaints as amended (paragraphs 17, 18, 19, pp. 26-29), the proof (page 109), and the court's findings (finding 22 page 74) conclusively establish the fact that the original assessment against the lots of the several improvement districts has been fully paid. Thus Finding No. 22 reads as follows:

> "22. That prior to the taking of the property and use as a part of the American Falls reservoir and prior to the flooding thereof, the defendant did not pay or cause to be paid all the liens against said improvement districts, but only paid the amount shown

upon the original assessment, and at the time of the paying of the amount shown on the original assessment the defendant was aware that said original assessment through mistake and inadvertence was not sufficient to pay the bonds issued by said Districts 1, 2 and 8 as the same became due and payable in accordance with their terms."

Judgment having been given on the theory, that acquiring the lots of the several districts removed them from the power of reassessment and destroyed the remedy of reassessment alleged to have otherwise been available to the plaintiffs, if the remedy of reassessment was unavailable to the plaintiffs against the lots in ownership of private individuals, it necessarily follows that the plaintiffs are not deprived of a remedy by officers of the United States, no contract with the United States is implied, and the trial court lacked jurisdiction.

Section 4141, Idaho Compiled Statutes, provides:

"4141. In all cases of special assessments in local sewerage improvements or sewerage disposal works of any kind against any property, person or corporation whatsoever, where any such assessments have failed to be valid in whole or in part for want of form, or of sufficient informality or irregularity, or nonconformance with the charter, ordinances or provisions of law governing such assessments, the city council or trustees, or other authorized bodies or board shall be, and they are hereby authorized to re-

> assess such special taxes or assessments and to enforce their collection in accordance with the provisions of law existing at the time the reassessment was made.
>
> Whenever, for any cause, mistake or inadvertence, *the amount assessed shall not be sufficient to pay the costs of sewerage improvement made and enjoined on the property,* or on the owners of property in the local assessment district where the same is made, it shall be lawful and the city council or trustees or other authorized body or board is hereby directed and authorized to make reassessment upon all the property in said local assessment district to pay for such improvements, such reassessment to be made and collected in accordance with the provisions of law or ordinances existing at the time of the levy." (Italics supplied).

There is no allegation in the complaints, nor is there evidence or findings, to show the cost of the improvements, and no attempt has been made to show that the original assessment was not sufficient to pay the actual cost of such work. Proof and pleadings are also lacking of any circumstances designated by the statute as will bring the same into operation. The section quoted has been construed by the Idaho Supreme Court in the case of *Lucas v. City of Nampa, supra,* in which the opinion is in part quoted as follows:

> "It is true that C. S. section 4141, provides that in cases of special assessments in local sewerage im-

provements, where any such assessments have failed to be valid for want of form, or of sufficient formality or regularity, or conformance with the chapter, ordinances, or provisions of law governing such assessments, the city is authorized to reassess such special taxes and enforce their collection in accordance with the provisions of law existing at the time such reassessment is made. It is clear, however, that the reassessment attempted to be made in the instant case was not made for any reason assigned in the statute, nor was it made in conformity therewith, but, on the contrary, the city authorities found that, after paying a 10 per cent commission for the sale of the bonds, the employment of the city engineer upon a basis of 5 per cent of the cost of the project, and incurring the other expenses in the construction of the works, the cost of the completed system with these additional expenditures would approximate $160,000 instead of the $118,300 contained in the estimate of the city engineer in the original ordinance of intention."

> *Lucas v. City of Nampa*, 37 Ida. 763; 219 Pac. 596.

Attention is again directed to the finding of the Court quoted above

> "that the defendant was aware that said original assessment through mistake and inadvertence was not sufficient *to pay the bonds* issued by the district * * * "

a contention identical in principle, and unavailing in the case of *Lucas v. City of Nampa,* as shown by a portion of the opinion quoted.

Action Barred by State Statute of Limitations

On Demurrer—not jurisdictional
Assignments of Error 2, (page 161)
and 16 (page 166)

The United States is entitled to the benefit of the State Statute of Limitations.

Stanley v. Schwalby, 147 U. S. 508.

The bar of the State Statute of Limitations was raised and pleaded as the Defendant's sixth defense (Answer to second amended petition, page 57).

Any cause of action which the plaintiffs may have had is barred.

Sections 6596, 6597, 6607, 6609, 6611 and 6617, Idaho Compiled Statute.

Section 6611, read in connection with Section 6607, is as follows:

"6607. The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:

6611. Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

Obviously, this is not an action for recovery of real property but is either an action based upon a liability created by statute (for the lien on this property claimed by the plaintiff, if any exists, was a lien created by statute) or it is an action based upon an alleged trespass upon real property, for it is alleged in the amended petition in the one case and in the second amended petition in the other that

> "on or about the first day of January, 1927, the defendant * * * took absolute, permanent and exclusive possession, title and control of all * * * the real property within said Local Improvement District * * * *for a public use and purpose, to-wit, for a reclamation reservoir, which reservoir is commonly known as the American Falls reservoir, and sold, destroyed or removed all improvements located upon the lots and parcels of land within said * * * improvement districts and inundated and permanently flooded the land embraced within said * * * improvement districts."
>
> (pages 28-29)

Notwithstanding the undisputed evidence—

(a) that the United States purchased the lots of the several improvement districts by separate lot purchase transactions from 1920 to 1926 inclusive (pages 131-134);

(b) that the United States took possession of the several lots as payment was made therefor (page 124, defendant's exhibit 1, page 144);

(c) that all of the buildings upon the lots were removed between April, 1925, when witness Sparks moved his house off, and the winter of 1925 or spring of 1926 (page 123);

(d) that the dam was completed in 1926 and some water stored behind the same in the winter of 1925-1926, and the same filled to capacity in the winter of 1926-1927 (page 131);

The Court found as a fact: that the former record owner thereof (lots of improvement districts) retained the right of possession until January 1, 1927, and that the property was taken for a public purpose and flooded shortly after January 1, 1927 (page 76, finding 25) and concluded that the statute of limitations began to run on that date (January 1, 1927). (Conclusion 3, page 77).

Case 743 was commenced in July 1930 (case 743, p. 57), later than 3 years from the accrual of the action under the trial court's theory. It seems obvious that when the United States acquired the first lot in 1920 for reservoir flowage purposes, ownership thereof was assumed, and exclusive dominion thereover exercised, and had the plaintiffs any lien, their right of action immediately accrued. But if plaintiffs were obliged to wait until there has been an actual physical destruction of the property upon which they claimed their right of lien, what peculiar virtue has the destruction by flooding, that the actual tearing down and moving away of property does not have to accrue their right of action and start the run-

ning of the statute of limitations? Witness Sparks testified that he moved his house off of the reservoir site in April 1925 and that all the other buildings in the site were moved between that time and the winter of 1925 or early spring of 1926.

Not only were the plaintiffs' allegations and proof insufficient to show jurisdiction of the trial court to hear and determine the cases, but it also appears affirmatively that the actions are barred under the provisions of the state statutes of limitations.

The plaintiff's complaint as amended failed to state a cause of action in several other particulars which were called to the attention of the trial court by demurrer to the original and amended complaints.

(Assignments of Error Nos. 1-2, p. 161; Deft. Demurrer 31-38)

As has already been pointed out (page 45 hereof) the plaintiffs' causes are dependent upon Section 4141, Idaho Compiled Statutes, providing in substance that whenever through mistake or inadvertence the amount originally assessed shall not be sufficient to pay the *costs of the improvement,* a reassessment under certain circumstances may be had, while the allegations of their complaint wholly fail to bring the purported reassessment in 1928 within the purview of the statute.

Neither the allegations of the complaint nor the findings of the Court support any right of reassessment, for it

is only alleged and found that the original assessment was insufficient to pay *the principal and interest on the bonds*, while the statute authorizes reassessment only when the original assessment *"is insufficient to pay the cost of the improvement."* The cost of the improvement is a different thing altogether from the principal and interest on the bonds.

Paragraph 17 of the second amended complaint in the Benevolent Corporation case (page 26) alleges in part as follows:

> "17. That under date of July 3rd, 1928, and while the above described bonds, so owned and held by the plaintiff herein, and which are involved in this action, and the interest on said bonds, were due, owing and unpaid, on account of the mistake or inadvertence of the board making the original levy and assessment of benefits *having failed to levy an amount sufficient to pay the principal and interest on said bonds as the same become due*, and in order to comply with its statutory duty in the premises, the City of American Falls (formerly the Village of American Falls), regularly enacted its ordinances Nos. 122, 123, and 124, which were ordinances providing for a reassessment of benefits upon all taxable property in said districts 1, 2, and 8 respectively, * * * (Italics supplied).

One pleading a statute and asking its benefits must surely bring himself within its terms. The Supreme

Court of the State of Idaho has in *Lucas v. City of Nampa, supra,* held that a deficit upon original assessment *to pay the costs of the improvement* is essential to bring into operation the section of the statute relied upon.

The complaints as amended also fail to allege another essential to state a cause of action, namely, the ownership of the claim in the plaintiffs at the time the same accrued.

Roberts v. Nor. Pac. Ry., 158 U. S. 1.

Brothers v. United States, 250 U. S. 88.

U. S. Revised Statutes, Sec. 3477.

U. S. Compiled Statutes, 1918, Sec. 6383.

Paragraph 7 of the plaintiff's second amended complaint in the Benevolent Corporation case alleges in part as to the ownership of the bonds upon which the actions are based, as follows:

> "and that thereafter (the issuance of the improvement district bonds by American Falls, and their purchase by one John K. Mullen) * * * said John K. Mullen sold, transferred and set over to the plaintiff * * * the bonds aforesaid." (Page 16).

The damage to the holder of the bonds is alleged to have occurred not later than January 1. 1927. It was necessary for the complaint as amended to show that the plaintiffs were the owners of the bonds at the time the injury thereto occurred. A transfer of the bonds after the injury complained of does not include the claim for damages, the presumption being that the purchaser of damaged property pays only the depreciated value thereof.

This rule is clearly announced in the opinion of the U. S. Supreme Court in *Roberts v. Northern Pacific R. R. Co., supra,* reading:

> "It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession."
> 158 U. S. 1.

The rule is especially applicable to claims against the United States under the prohibition by Rev. Stat. 3477 against the assignment of such claims. The federal statute cited is given construction by the U. S. Supreme Court in the case of Brothers v. United States, *supra.*

The complaint as amended charges the defendant with having, in the exercise of powers of eminent domain, acquired the lots in the several improvement districts in a lawful manner; also that the assessments, made against the lots for payment of the bonds claimed by plaintiffs, are liens. The liens of State and County taxes take precedence over liens of improvement district assessments, and the failure of plaintiffs to allege that the lots of the

improvement districts were not acquired by the United States at tax sale for delinquent state and county taxes make their complaints as amended deficient to state causes of action.

Sec. 3097, Idaho Compiled Statutes.

Bosworth v. Anderson, 47 Ida. 697; 280 Pac. 227. Section 3097, above cited, provides that all property subject to taxation shall be subject to a lien for state and included municipal taxes, "and shall only be discharged by payment, cancellation or rebate * * *."

Upon a clash of interest between special improvement district bondholders and local municipalities as to the precedence of the respective liens of improvement district assessments and general State and County taxes, the Idaho Supreme Court in *Bosworth v. Anderson, supra*, held:

> "The decree of the trial court holding state, county and city taxes superior to special improvement assessments, and denying the claim of the bondholders against the county for a share in the proceeds of the sale of the various pieces of property sold by the county for state, county, and city taxes, and denying appellant's claim against the city for amounts collected by the city as principal and paid as interest, is sustained."
>
> 47 Ida. 697, 280 Pac. 227, 230.

The complaints as amended fail to state a cause of action also in that they do not show that the plaintiffs own

all of the outstanding interest in the bonds of the several improvement districts.

The complaints as amended allege the issuance of all bonds of the districts (pages 15, 22 and 25) and that the plaintiffs purchased less than all of those issued and sold. The market value of the lots must be the maximum which the United States would be required to pay in any event; therefore, the complaints which failed to allege the ownership of all bonds in the plaintiffs fail to state a cause of action.

Error on Motions to Strike and Make More Definite and Certain.

(Assignments of error No. 3, page 161)

The amended complaint asks that the United States pay interest upon the bonds claimed by the plaintiffs to the extent that the whole amount of principal and interest has not been paid by the city of American Falls. Thus in paragraph 20 of the amended complaint in the Benevolent Corporation case, it is alleged that the United States is indebted to the plaintiff for interest (page 30). The same is true of paragraph 10 of the amended complaint in the Investment Company case (No. 743, page 23). The trial court not only permitted the objectionable portions of the complaint to stand, but actually allowed the plaintiffs' interest (pages 78 and Pl. Ex. 14, page 144) against the United States. In this we think the Court was in error.

Boston Sand & Gravel Co. v. United States, 278 U. S. 41-55.

ON THE MERITS

(Assignments of Error 5, 7, 8, 10, 11, 16, 17, 18, 19)

At the trial the plaintiffs offered the bonds in question, and in proof of their ownership the trial court first denied and later received the hearsay testimony of one Chester Greene, who testified that he had never been an officer of either of the plaintiff corporations and that all he knew about the ownership of the bonds was what one J. K. Mullen told him on the occasion of his (J. K. Mullen's) delivery of said bonds to witness and Mr. Bissell for collection in 1928 (pages 82-98).

Timely and insistent objection was made to the testimony of this witness (pages 82, 84, 86, 87, 88, 89, 92, 93, 97, 98). The trial court alternated in sustaining and overruling counsel's objections to this testimony but apparently the same was accepted as competent proof for the court found upon the testimony of this witness alone, that the plaintiffs were the owners of the bonds (Finding 7, pages 62-63). The adverse rulings of the court upon the admission of this testimony and the findings of the court based thereupon are assigned as error (assignments 22 (a) to (d) inclusive).

Accepting the hearsay testimony of witness Greene as to ownership of bonds in the plaintiffs, there was no testimony, hearsay or otherwise, that the plaintiffs owned the bonds at the time the alleged cause of action thereupon accrued. All that Chester Greene knew about the bonds was that he saw them delivered to witness and Mr. Bissell

in 1928 by a J. K. Mullen (not an officer or stockholder of nor shown to be in anywise interested in the plaintiff corporations), who said, at the time, that bonds numbered

21 to 24 of district No. 1,

12 to 15 of district No. 2,

28 to 43 of district No. 8, (Pl. Ex. 1 to 3 inc.)

were for the plaintiff Benevolent Corporation, and that bonds 38 to 51 of District No. 9 (Pl. Ex. 4) were for the plaintiff Investment Co. (pages 141, 142). The only possible presumption of ownership that might be inferred from this testimony was that the bonds belonged to J. K. Mullen. There could be no presumption in any event that the plaintiffs became the owners of the bonds before they were thus delivered. Witness Greene also testified (from hearsay) that the plaintiff Benevolent Corporation was not organized until 1925 (page 96).

If any cause of action accrued upon the bonds, it accrued when the United States acquired title to the lots alleged to have been impressed with some kind of an interest in the improvement district bondholders, and under the rule of *Brothers v. United States, supra,* and the specific prohibition against the assignment of claims against the United States the plaintiffs' proof as well as their pleadings have failed, and upon the refusal of the Court to so hold, the appellant has assigned error (Assignments of error: No. 2, page 161; No. 7, page 163, No. 8, page 163, No. 10, page 164, and No. 11, page 164).

There was no proof that the owners of the bonds in question had any interest in the lots of the several im-

provement districts at the time the United States acquired title.

> Secs. 4146, 4147, 4148, 4133, Idaho Compiled Stats.
>
> *Bosworth v. Anderson*, 47 Idaho 697; 280 Pac. 227.
>
> *Heine v. Commissioners*, 19 Wall. 655.
>
> *Lyon v. Alley*, 130 U. S. 177.
>
> *United States v. City of Buffalo*, 54 Fed. (2) 471.
>
> *United States v. Pierce County*, 193 Fed. 529.
>
> *Bannon v. Burnes*, 39 Fed. 892.

Section 4146, Idaho Compiled Statutes, provides in part as follows:

> "4146. *Redemption by owner from assessment.* The owner of any lot or parcel of land charged with any such assessments may redeem the same from all liability for such assessment by paying the entire assessment charged against such lot or parcel of land, without interest, within 30 days after notice to him of such assessment, which notice shall be given as follows:"

Section 4147 provides:

> "4147. *Same: After bonds issued.* The owner of any such lot or parcel of land may redeem the same from all liability for said assessment at any time after said 30 days by paying all the instalments of said assessment remaining unpaid and charged

against such property at the time of such payment, with interest thereon at the rate of not to exceed 8 per cent per annum from the date of issuance to the time of maturity of the last instalment."

Section 4148 reads in part as follows:

"4148. *Same: Effect of redemption.* * * *
Where any piece of property has been redeemed from liability of the costs for any improvements as herein provided, such property shall not thereafter be liable for further assessment for the costs of such improvement except as hereinafter provided."

Section 4141, I. C. S., is the only section of the statutes to which the last quoted section could have any possible reference, and this section in part provides as follows:

"4141. *Reassessment.* * * * Whenever, for any cause, mistake or inadvertence, the amount assessed shall not be sufficient to pay the costs of sewerage improvement made and enjoined on the property, or on the owners of property in the local assessment district where the same is made, it shall be lawful and the city council or trustees or other authorized body or board is hereby directed and authorized to make reassessment upon all the property in said local assessment district to pay for such improvements, such reassessment to be made and collected in accordance with the provisions of law or ordinances existing at the time of the levy."

Aside from the statute making the assessments levied for the payment of the improvement, the only lien upon the lots of the improvement district, there are numerous reasons for the rule that the assessment and not the bond is the lien upon the property, principal among which is that the bond is issued, sold and transferred without notice to the lot owner, while the assessment cannot be constitutionally made without such notice and an opportunity to be heard upon the justice of the same.

The bondholder looks to the assessment as the measure of his security, and the lot owner, as the limit of his liability.

Bosworth v. Anderson (*supra*).

The bondholders claim of implied contract is of necessity based upon a claim of lien upon the lots at the time they were acquired by the United States. The original assessment was paid in full at the time of the government's purchase (Testimony of Willard S. Bowen, page 109; Finding 22, page 74). At that time the bondholders, whose identity was unknown to officers of the government, had at best a right to have the lots reassessed.

> "It is said in argument that plaintiffs have a lien upon the taxable property of the district for the payment of these bonds, and that equity always enforces liens where no other mode of enforcing them exists. Whether this be true doctrine of a court of equity to the full extent here claimed, we need not decide. Nor need we decide whether taxes once lawfully levied

are, until paid, a lien on the property against which they are assessed, though it is laid down in the very careful work of Judge Dillon, that taxes are not liens upon the property against which they are assessed, unless made so by this charter, or unless the corporation is authorized by the Legislature to declare them to be liens. 2 Dil. Corp., 659. But here no taxes have been assessed except those which have been released by the bond holders accepting new bonds for the interest of the year so assessed. And it is too clear for argument that taxes not assessed are not liens, and that the obligation to assess taxes is not a lien on the property on which they ought to be assessed. This was one of the points urged and overruled in the case of Rees v. Watertown."

Heine v. Commissioners, 19 Wall. 659.

The testimony of Willard S. Bowen, accountant, who prepared and submitted several reports upon audit of the improvement district bond funds of the city, did not give any support to the proposition that the bonds in question were liens. The reports of the audits were admitted over objection that the same were immaterial, the pleadings having admitted that the original assessment had been paid in full (pages 100, 102, 104) and the rulings of the Court are assigned as error (assignments of error 23 (a) to (e) inclusive).

Witness Bowen's testimony was—

That the original assessments have proven insufficient

to pay the principal and interest of the bonds in full (page 104) due principally to the "unexpected continuation" of interest payments on the bonds, which in turn he testified was due

(a) to loss of bond funds in failure of depository of the city (pages 110, 112).

(b) to unexplained dissipation of bond funds of districts Nos. 8 and 9 (pages 115, 116).

(c) to failure of city when issuing bonds to time their maturity dates with collection time of assessments (pages 111-112).

(d) to failure of city when issuing bonds to issue them in smaller denomination (page 109).

(e) to delay in making principal payments with bond funds on hand by the city (pages 110-111).

These losses and delays absorbed funds intended for principal and interest payments. This is summarized in witness Bowen's report of December 18, 1926 (Plaintiffs' Exhibit 9, page 143) as follows:

> "You will note from Schedule 'C-1' to 'C-4' inclusive, that in all of the special improvement funds, a far greater amount of interest was paid out than was estimated to be necessary originally. The following comparison will furnish a concise analysis of this:

	Total	Sewer Dist. Number 1	Sewer Dist. Number 2	SW. Dist. Number 8	SW. Dist. Number 9
Bond Interest Paid	$38,359.52	$11,865.00	$3,535.00	$9,959.32	$13,000.20
Amount Originally Estimated	24,150.72	7,360.83	2,251.48	6,789.53	7,748.88
Excess over Estimate	$14,208.80	$ 4,504.17	$1,283.52	$3,169.79	$ 5,251.32
By then deducting from this excess interest paid the amount of excess receipts over and above the amount of the original set-up (as given in the third section of Schedule 'E' amount to	$ 3,641.34	$ 1,871.44	$ 186.91	$ 897.22	$ 685.77
This gives us an amount which roughly approximates the present deficiency in the various funds as shown in the last section of Schedule 'E'	$10,567.46	$ 2,632.73	$1,096.61	$2,272.57	$ 4,565.55

This definitely proves that it was the *unexpected continuation* of interest payments on bonds that was most largely responsible for the present deficiency in these special funds."

(Witness Bowen's Report, Pl. Ex. 9, page 143)

The testimony of witness Bowen established the defendant's first defense to the action, namely, that the city which is the collection agency of the bondholders was responsible for any failure of payment of bonds.

After the bank, in which improvement district bond funds were on deposit, had failed in February, 1923, witness Bowen was called upon to audit the several funds mentioned which he did and reported on April 17, 1923, as follows:

"I present herewith a report showing the results of a special audit of the available records covering transactions in Local Sewerage Improvement Districts Numbers One and Two, and Local Sidewalk Improvement Districts Numbers Eight and Nine, which I trust will solve the problem with which you have presented me, namely: 'Why is the City of American Falls so far behind with the payments of Bonds issued for the use of the Districts above enumerated?'

I wish to say, gentlemen, that I have spent exactly as much time in attempting to gather together records and papers from which to compile the within statements as it has taken to compile the statements.

The Books of the City are lacking in a great many particulars, the most outstanding one being that no Cash-Book or Ledger has been kept, in which to record the financial transactions of the city. This has made my work rather uncertain, as I have been compelled to gather most of the data for this report from the Books of Power County, and from the Records of the First National Bank of this city. In the earlier portion of the period covered by my audit, the County records with respect to some transactions are quite meager, which has only added to the difficulty of the work. Many Bank statements, together with the accompanying cancelled vouchers or warrants are missing entirely, and while recourse to the Bank's records gives the amount of the transactions, yet it furnished no vouchers to support such transactions, thereby losing the greater part of the value of the information. The statements contained in this audit are presumed to be correct only to the extent of the validity and correctness of the records from which they were compiled.

Accordingly to the best available data, the failure of the bonds to be paid according to the degree originally planned is due to the following reasons, more fully explained in the pages referred to opposite each item:

Special District Funds used for purposes
other than those for which they were
assessed and paid (as per tabulation

on page 2)	$4,338.48
Excess interest paid on account of the bonds not being paid as originally planned, the interest of course, continuing until the bonds were paid (as per tabulations on page 3)	6,556.15
Delinquent taxes yet due on Special Districts (as per tabulations on page 3	8,428.43
Taxes unpaid on account of the property on which same have been assessed deeded to County for taxes due, the County being Trustee for, and being responsible to the City for same whenever paid (as per tabulations on page 3)	1,151.93
Failure to assess proper amount to retire principal on bonds of Sewer District No. 1	355.19
These differences aggregate	$20,830.18"

(Pl. Ex. 8, page 143 of transcript).

The first item in the above summary was explained in a later report (plaintiff's Exhibit 9) but the excess interest item was not explained, except for the reasons given which we have hereinbefore, on page 64 summarized. This showing of dissipation of funds collected for payment of the bonds is superfluous to the application of the principle that the right to assessment is not a lien

upon property in contemplation of assessment. It goes further and shows conclusively that under a statute which authorizes a city council or board of trustees to make a reassessment,

> "Whenever for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the *costs of sewerage improvement* made and enjoined on the property or on the owners of property in the local assessment district where the same is made, * * *" (Sec. 4141, I. C. S.),

the bondholders have never had a right to have the lots of the several improvement districts reassessed. The allegations of the complaint and the findings of the court merely set out that the original assessment was insufficient "*to pay the principal and interest on the bonds*" which is a different thing altogether from the "*cost of the improvement*" especially where the interest was increased by delays in payment of principal resulting from the bank failure and other causes, and the judgment fund recovered from the sidewalk contractor is shown to have been misapplied to other purposes.

One of the losses to principal of the bond fund was testified to by witness Bowen as the unexplained misappropriation and wasting of a fund of $2916.53 paid to the city by an improvement district contractor upon a judgment. His payment was made on January 3, 1917. For no apparent reason the trial court sustained an objection to the testimony with respect to this fund as the

same pertained to districts Nos. 1, 2 and 8 involved in the Benevolent Corporation case.

> "Mr. Bissell: I object to the introduction of any evidence concerning the recovery of judgment against Sam Forter as far as Districts 1, 2 and 8 are concerned, that being a cause of action for defective construction of sidewalks, in District No. 9.
>
> That is not material here.
>
> The Court: Objection sustained, but not as to No. 9.
>
> A. Sam Forter was a contractor who constructed all, or part at least, of the sidewalks in District No. 9." (Page 113).

Witness Bowen's report (Pl. Ex. 9) refers to this judgment as a credit to the two sidewalk improvement districts, Nos. 8 and 9. His report reads in part:

> "It also appears that a judgment was taken against Sam Forter which was in connection with sidewalk districts 8 and 9, and which resulted in the receipt by the city on Jan. 3, 1917 of $2916.53."

It will be remembered that the bonds of Sidewalk Improvement District 8 are involved in the Benevolent Corporation case and those of District No. 9 in the Investment Company case.

This ruling of the Court is assigned as error (Assignment of Error 23 (i), page 184).

Proof at the trial does not establish such indispensable elements of plaintiffs' cases as

(a) ownership of any bonds in plaintiffs;

(b) ownership of bonds at the time any right of action thereupon accrued;

(c) that the original assessments having been paid in full and no reassessment made at the time the United States acquired title, the improvement district bonds are, in themselves, an interest in the lots of the districts;

(d) that a reassessment is authorized under the laws of Idaho;

(e) that in view of the fact that the extent of recovery in any event is the value of the property taken, there was no proof that the property acquired by the United States had any value whatsoever;

(f) that the officers of the United States in acquiring title recognized the purported interest of the plaintiffs in the property being acquired.

On the contrary, the proof establishes the defenses of the defendant

(1) that improvement district bonds were not liens upon the property acquired by the United States;

(2) that the loss to the bondholders was due to action of the city of American Falls, and the same was greatly reduced by action of the United States in purchasing the lots of the improvement districts resulting in payment of delinqent improvement district assessments including interest and penalties;

(3) that the city had made no reassessment when the government's title was acquired and had no right at any time to make a reassessment; and

(4) that any rights of action which the plaintiffs may have had were barred by the statute of limitations of the State of Idaho.

ERRORS IN FINDINGS OF FACT

(Assignment of Errors 4, 6, 8, 9, 10, 12, 13, 14, 15, 20, 21, pages 161 to 170 inclusive).

The court made findings of fact and conclusions of law n which errors were by the defendant pointed out in a notion to correct, which the court denied. Error is assigned to the objectionable findings and to the ruling of he court upon the motion to correct findings (Assignment of Error 26, page 189).

While the numbering of the objectionable findings in he two cases is different, the same are practically idenical.

The objections to the several findings are obvious from the findings themselves as pointed out in the appellant's motion to correct the findings, and in the assignments of error, and failure to explicitly mention in this brief is not intended as a waiver thereof. Objections to the rulings of the court upon the admissability of evidence, as pointed out in assignments of error (Nos. 22 to 25 inclusive, pages 171-188) and which may not have been expressly commented upon in this brief, are also expressly saved.

To summarize the numerous objections to rulings of the trial court

1. The court improperly assumed jurisdiction because the actions alleged and as shown by the testimony

A. are not upon implied contract;

B. were not commenced within the 6-year period fixed by the Tucker Act for the commencement of such actions, and

C. The action of the United States in acquiring the property was beneficial to rather than detrimental to the bondholders and in any event any injury would be too remote and consequential.

II. Upon the pleadings, it is shown

A. that the actions of the plaintiffs are barred by the Idaho statute of limitations;

B. that by alleging payment in full of the original

assessment, the plaintiffs negative any right of action because reassessments contemplated but not yet made are not liens upon property proposed to be thus reassessed;

C. if the right to reassess is a lien, the complaints, which allege the original assessments paid are insufficient to pay the principal or interest of improvement district bonds, do not allege a right to have such reassessments made and, therefore, fail to state a cause of action.

D. That the time of assignment of the bonds to the plaintiffs, not being shown, there is no cause of action in the plaintiffs if the action accrued prior to the assignment.

E. that the complaints, which fail to allege that the plaintiffs are the owners of all outstanding improvement district bonds of an aggregate obligation of no more than the value of the lots in the several improvement districts, fail to state a cause of action.

III. That those portions of the complaints charging he United States with interest should have been stricken.

IV. On the merits—

A. upon the testimony and exhibits offered, the trial court should have dismissed the actions for jurisdictional grounds summarized in "I" above;

B. non-suit should have been granted because of failure of proof—

(1) to show any interest of the plaintiffs in the bonds in suit;

(2) to show ownership of the bonds when the plaintiffs cause of action accrued;

(3) to show that the bonds represent any interest in the lots of the several improvement districts;

(4) to show any right of reassessment in the city of American Falls for the benefit of the bondholders;

(5) the proof shows the bondholders loss, if any, was due to acts of the city of American Falls, and was mitigated by action of the United States in acquiring the lots of the improvement districts.

V. The findings are not supported by the evidence and are contrary to the evidence in that

A. There is no evidence to support the finding that the value of the lots acquired by the United States is or was at any time in excess of the amount due upon improvement district bonds.

B. There is no evidence to support the finding that the plaintiff owned the bonds or that the same were ever transferred from J. K. Mullen.

C. Evidence that the United States acquired title to the lots of the several improvement districts between 1920 and 1926 and that T. C. Sparks removed his house in April 1925 from his lot upon its sale to the United States, is contrary to the finding that the United States took possession, title and control of the property on January 1, 1927, or removed or destroyed the improvements thereon;

D. The court should have corrected his findings as requested to do so by the defendant's motion for that purpose.

VI. The court erred in ruling upon the admissibility f evidence as assigned in assignments Nos. 22-25 inusive.

Circumstances similar to those shown by the record the two cases at bar must have impelled the author of e opinion of the Supreme Court of the United States the Smoot case (*supra*) to say

"There is, in a large class of cases coming before us from the Court of Claims, a constant and ever recurring attempt to apply to contracts made by the Government, and to give to its action under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises, in the mind of parties and counsel interested for the individual, against the United States

a sense of the power and resources of this great Government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity, coloring even the closest legal argument. These are addressed in vain to this Court. Their proper theater is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims to cases arising out of contracts express or implied—contracts to which the United States is a party in the same sense in which an individual might be, and to which the ordinary principles of contracts must and should apply."

82 U. S. 36 at 45.

In the Smoot case there was an express contract. Here the contract is at best a strained fiction implied at law, to sustain which, it was necessary for the trial court to go beyond its jurisdiction upon an ordinary suit, and to hold that the plaintiffs are entitled to recover against the United States for such acts as an individual would not be amenable, as established by a construction of local laws and an application of rules of evidence at wide variance with such laws and rules as they are construed and applied in suits against an individual. The trial court instead of limiting its jurisdiction in suits against the United States to claims upon contracts in respect to which the plaintiffs would be entitled to redress against the United States either in a court of law, equity or admiral-

y if the United States were suable, has greatly expanded t, notwithstanding the express provisions of the Tucker Act to the contrary.

The plaintiffs complaints as amended should be dismissed.

Respectfully submitted,

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Service of the within and foregoing Brief of Appellant by receipt of copy is hereby acknowledged this.......................

day of..., 1932.

....

....
Attorney for Respondents

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE JOHN K. and CATHERINE S. MULLEN BENEVOLENT CORPORATION, a corporation, Appellee, vs THE UNITED STATES OF AMERICA, Appellant	No. 6867
THE J. K. MULLEN INVESTMENT COMPANY, a corporation, Appellee, vs THE UNITED STATES OF AMERICA, Appellant	No. 6868

APPELLEE'S BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IDAHO, EASTERN DIVISION.

HON. CHARLES C. CAVANAH, District Judge

BISSELL & BIRD,
Of Gooding, Idaho,
For Appellee.

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APPELLEE'S BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IDAHO, EASTERN DIVISION.

HON. CHARLES C. CAVANAH, District Judge

BISSELL & BIRD,
Of Gooding, Idaho,
For Appellee.

Filed Dec. ...., 1932,

...., Clerk.

All figures in parentheses refer to page numbers of the transcript in case bearing District Court No. 731, No. 6867 in this court, unless otherwise stated. All heavy type is that of the writers'.

EXCEPTIONS TO APPELLANT'S STATEMENT OF FACTS

Appellee considers that the appellant's statement of facts is somewhat incomplete in certain particulars, and slightly inaccurate in other particulars. On page 9 the statement is made that the assessments were paid in full on the lots acquired by the United States. This statement is probably not legally correct, because as a matter of law the re-assessments are part of the assessments, and it cannot be accurately stated that any particular lot has paid its assessment in full until the entire obligation has been discharged. As will be later pointed out, the government officials knew, and it was a matter of common knowledge in American Falls, that these assessments were not paid in full at the time the government acquired these lots and at the time the property owners gave over possession of the reservoir site to the United States. The government officials withheld a portion of an agreed purchase price until some time in 1929, and then released these sums to the individual property owners. The evidence upon this phase of the case is shown in some detail beginning on page 22 of this brief.

At the bottom of page 9 of appellant's brief the statement is made that the government purchased these lots from the property owners from 1920 until 1926. The inference is made here and at numerous points in the brief that when the government purchased a particular lot it then and there became the absolute owner of such lot. The fact is that at the time of purchasing these individuals plots the government and the individual owners signed land purchase contracts, a sample of which appears as defendant's exhibit 1 (144). Paragraph 3 of this purchase contract obligates the vendor to convey the property to the United States by good and sufficient deed. As is pointed out on page 3 of Judge Cavanah's memorandum opinion these deeds contained the following provision.:

> "Vendor retains possession of all the buildings and improvements on the above described land, and agrees to remove the same to land outside of the American Falls Reservoir site by January 1, 1927."

In other words, when these individual purchases were made by the government the owners were not disturbed in their possession and enjoyment of the property immediately, but they were permitted to continue such possession and use until the dam was sufficiently completed to permit water to be impounded in the reservoir. As the trial court found, these individual owners re-

mained in possession until about the 1st of January, 1927, about which time the reservoir was filled (76).

On page 10 of appellant's brief reference is had to certain condemnation suits. Appellant neglects to state that neither the appellee nor its predecessor in interest was a party to these suits (76).

On page 10 of appellant's brief the statement is made that the payments made by the goverment benefited rather than injured appellee. Page 113 of the record is cited to support this statement. We find nothing on the latter page to this effect. No doubt the payments made by the government benefited appellee and other property owners in the district. It is not the payments actually made that appellee is complaining of. The appellee is complaining because the government appropriated appellee's property and destroyed its security before completing the payments.

On page 11 of its brief appellant states that the work of tearing down and moving the buildings from the reservoir site commenced in 1920 or 1921, and continued through the year 1925. No reference is given for this statement. We do not believe that the record bears out this statement. Upon this point the record merely shows that the Grand Hotel, the last building to be moved from the reservoir site, was moved either in the winter of 1925 or in the spring of 1926 (123). The record does

not show when the first buildings were moved or when any other than this one building was moved. The same error will be found in the "chronology" on p. 15 of appellant's brief.

Appellee also takes exception to appellant's statement of the theory upon which the trial court's findings and judgment are based, as contained on page 13 of appellant's brief. In a few words the theory upon which the cases were submitted and determined by the trial court is that the government has appropriated private property for a public use without making just compensation to the owners, and thereby the government has become liable to the owner upon an implied contract. This theory is borne out by the findings and conclusions, and also by the court's memorandum opinion. The latter opinion was not incorporated into the printed record. After the printed record was filed, counsel for appellant advised appellee that such memorandum opinion was being supplied to this court by a supplemental record, and the writers assume that the same is now available to this court.

Appellee considers that a more concise and more pertinent statement of the facts is necessary.

APPELLEE'S STATEMENT OF FACTS

In 1915 and 1916 certain local improvement districts were organized in the city of American Falls under the provisions of the Idaho Compiled Statutes, sections 3999

et seq. Under these statutes an improvement district may be organized from a part of a municipality. After certain preliminary steps the ordinance creating the district is enacted. This ordinance describes all the property in the district and provides that the improvements shall be made and the cost and expense thereof taxed and assessed upon all property in the district in proportion to the number of feet of each particular lot fronting on the street so being improved or contiguous thereto C. S. section 4007 provides that the expense and cost of the work shall be assessed against the lands and shall "become a lien upon said lands, which shall take precedence of all other liens, and which may be foreclosed in accordance with the provisions of the Code of Civil Procedure." Provision is made for exceptions by any property owner or tax payer. These assessments are known as special assessments and are to be levied and collected as a separate tax in addition to the taxes for general revenue purposes. C. S. section 4013.

Under the provisions of C. S. section 4014 the city officials are authorized to provide for the payment of these assessments on the installment plan, extending the payment over a period not exceding ten years. To do this bonds are issued, and the latter section provides the method of their issuance, the rate of interest, etc. Section 4018 specifies the form of the bond to be used. Sec-

tion 4024 provides for reassessment in case the original assessment is insufficient for any reason. Since the reassessments, later to be mentioned, are attacked, a paragraph of this section is quoted, to-wit:

> "Whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by owners of property in the local assessment district where the same is made, it shall be lawful, and the city council or trustees or other authorized board or body is hereby directed and authorized to make reassessments on all the property in said local assessment district sufficient to pay for such improvement, such reassessment to be made and collected in accordance with the provisions of the law or ordinance existing at the time of its levy."

Section 4026 requires the owner of any such bonds to look exclusively to the enforcement of such asessments for the collecttion of the amounts due him; the municipality being responsible only for the collection of the assessments.

It was under these statutory provisions that the local improvement districts in question were organized in 1915 and 1916, and in due course the bonds now before the court issued. The bonds were originally sold to Mr. J. K. Mullen, who in turn transferred the same to the plaintiffs. The bonds are payable to bearer. The improvement districts in question are all situated within the territory formerly occupied by the city of American Falls.

The building of the American Falls reservoir by the appellant necessitated the moving of the major portion of the city of American Falls, including all of the territory covered by the improvement districts in question, except a portion of district No. 9. The reservoir was built by the United States as a Reclamation Act storage reservoir, under authority of the act of June 17, 1902 (43 U. S. C. A. secs. 411, et seq.), but "without any proceedings in eminent domain against the plaintiff or its predecessor in interest J. K. Mullen, the defendant being aware and advised that the bonds held by this plaintiff (appellee) and the interest thereon were outstanding, due, and unpaid, * *"(71-2).

The government acquired most of the property for this reservoir site by direct purchase from the individual owners. The form of contract of purchase is shown by defendant's exhibit No. 1 (144). These contracts were made on different dates between 1920 and 1926. This particular contract was made December 9, 1925. Soon after the execution of the contract the individuals gave the government warranty deeds, which deeds and contracts, as pointed out in Judge Cavanah's memorandum opinion, permitted the sellers to remain in possession till January 1, 1927, or such earlier time as the premises might be needed for reservoir purposes. The contracts and deeds permitted the individual owner to remove

buildings from the site of the reservoir on to higher ground, the new townsite being nearby. The last building moved from the reservoir site was the Grand Hotel, which was late in the winter of 1925 or early in the spring of 1926 (123). The reservoir started filling in '26 and the entire reservoir site was flooded "on or shortly after January 1, 1927" (76).

The contracts of purchase between the government and the individual owners provided that any liens or incumbrances existing against the property might "be removed at the time of conveyance by reserving from the purchase price the amount necessary, and discharging the same with the money so reserved". See paragraph 7, defendant's exhibit 1. Consonant with this authority the government held out \$13,000 or \$14,000 for the purpose of meeting the balance due on the bonds involved in the present litigation (134-5). However, the government some time in 1929, apparently shortly before the institution of the present suits, determined that this money should be paid to the owners, and this was done. At the time this money was paid to the owners the government officials knew of the claims of the appellee in these two suits, and in fact it was a matter of common knowledge in the city (136 & 122-3).

While the act of making the reassessments does not seem to be very material in the present controversy, be-

cause the appellant had actual knowledge of the unpaid accounts, it definitely appears from the records that these reassessments were made by ordinances Nos. 122 to 125, inclusive, of the city of American Falls in the summer of 1928 (exhibit 16). These ordinances were not attacked in any direct manner and the same stand as the valid enactments of the city. These reassessments were made necessary by the insufficiency of the original levies. The causes of such insufficiencies are pointed out in detail by witness Bowen (111-118). In brief they are: (1) Lack of conformity between the denominations of the bonds and the collections realized from the assessments from time to time, resulting in moneys remaining idle frequently; (2) Maturity dates of bonds did not coincide with payment dates of taxes and assessments, resulting in moneys being used promptly; (3) In making the original assessments and levies no allowance was made for the 1½% collection fee (117), which C. S. sec. 3224 allows the county for collecting levies of such improvement districts (Bosworth v Anderson, 280 Pac. 227, 229); (4) The set-up on the assessment rolls for interest did not provide for interest on the bonds the first year, resulting in the use of money received for principal payments to meet interest requirements (117-8); (5) Insufficient interest charge on delinquent taxes as compared with interest on bonds (118); and (6) Non-payment of taxes by some of

the owners in the improvement districts. Due to these and many other factors all the bonds were not paid.

The one and only means of enforcing the assessment upon which appellee's bonds are based and the one and only method of collecting the amounts represented by the bonds in controversy was by the enforcement of the lien against the lands in these respective improvement districts. This is the provision of the statute, the holding of the Idaho courts and of the trial court in the immediate cause. Therefore, when on or about January 1, 1927, the United States took absolute and complete possession and control of this real property, the appellee's bonds and statutory liens were effectively and completely destroyed. This constituted the taking of private property for public use without compensation, and upon this theory the pleadings were drawn and the action instituted. Upon this theory the demurrer to the complaint was overruled, Judge Cavanah's opinion on the demurrer being reported in 40 Fed. (2) 937. In brief, Judge Cavanah held that the United States had appropriated to a public use private property, and the government thereby became liable upon an implied contract for the value of the property taken. The findings of fact and conclusions of law are in line with this theory, and the judgment is in favor of the appellee for the value of its bonds, less certain amounts. The major amounts for

which appellees were not given judgment as prayed were due to two factors: (1) The reservoir did not cover all of one of the districts, and a pro rata amount was deducted for the lands not taken; and (2) some moneys were collected from the owners, deposited in local banks, which banks closed before the money was paid over to the appellees or the then owner of the bonds. The latter amounts were deducted by the trial court, and the amount of the Forter judgment was also deducted. So that while the complaint in the immediate case asked for judgment of approximately $10,000.00 the amount of the judgment actually given is only $8,104.79 (78); and while in case No. 743—6868 judgment was asked in an amount in excess of $1500.00, the judgment actually given only amounted to $388.48 (63).

The two cases were consolidated for trial, the bills of exceptions are identical except for amounts, names and such factors, and the same have, by stipulation filed in this cause, been consolidated for argument in this court. The applicable law is the same in either case.

BRIEF OF THE ARGUMENT

U. S. STATUTE OF LIMITATIONS

On pages 20-2 of its brief the appellant cites several cases holding that the failure to bring an action within 6 years bars recovery. Unquestionably 28 U. S. C. A. sec. 41, subd. 20, fixes the limitation at 6 years. The only im-

portant problem is to determine when the statute began to run.

On page 22 of its brief the appellant takes the position that in this particular case the statute began to run "at the time the United States acquired the lands in question by purchase or condemnation." Appellee does not agree with this statement, but will discuss the appellant's position. Appellant cites no authority upon this particular phase of the case, that is, no authority showing that the mere signing of a contract to convey, and even an actual conveyance, permitting the vendor to continue the possession and enjoyment of the property, amounts to the taking of property so as to start the statute of limitations in an action for the taking of such property. Appellee does not feel that any such authority can be cited. There can be no liability on the part of the government in this case until the property is actually taken. A threat to take the property or a plan partly consummated cannot amount to a taking of the property. This is particularly true in this controversy, because so long as the land owners remain in the possession and enjoyment of their property, and so long as the property has not been flooded by the reservoir, appellee's lien upon the property remained physically intact and enforceable. It is only after the vendors have been compelled to vacate the property by the rising crest of the reservoir and the improve-

ments have been removed therefrom that appellee's lien and property right has been confiscated and destroyed. When that act occurs, then and only then does the appellee's right accrue. The trial court held that this happened about January 1, 1927 (76). This action was filed on November 25, 1929 (7), and the action in 6868 was filed July 24, 1930 (page 7 record in latter case). Both suits were therefore instituted within the statutory period of six years, as fixed by the Tucker act (28 U. S. C. A. sec. 41, subd. 20).

If it be conceded that appellant's theory upon this point is correct, appellee nevertheless insists that the bar of the statute cannot be upheld. On page 22 of its brief appellant states that the lots were purchased as early as 1920, "and a large part of the lots (were acquired) by purchase and condemnation between 1920 and 1923." By referring to the pages of the record cited by appellant we are unable to find that this quoted statement is borne out by the record. What the government engineer testified to was that he took possession of the first piece of land in 1920 or 1921 and the balance of the lots was acquired "between that time and the year 1926 when the dam was completed and some water stored behind the same." (131). This is far from a statement that the large part of the lots was acquired between 1920 and 1923. The fact of the matter is, as stated on page 22 of appel-

lant's brief, the record absolutely and completely fails to show just when any particular lot was acquired by the government, (except one lot which defendant's ex. 1 shows was bought in Dec., 1925) and therefore, under appellant's theory as to when the statute of limitations begins to run, there is no definite evidence in the record to fix the beginning of the statute as to any part of the land included within the improvement district and so confiscated by the government.

Appellant passes lightly over this phase of the case by intimating that this is a jurisdictional question and the duty rested upon the appellee to prove by competent evidence that its action is not barred by the statute of limitations. Unfortunately for appellant's position such is not the law. The law has become well recognized in a majority of the jurisdictions that the statute of limitations, being an affirmative defense, must be alleged and proved by the party relying thereon. In Idaho the majority rule prevails. In the recent case of Johnston vs. Keefer, 280 Pac. 324, 326, the Idaho court held:

> "The statute of limitations is an affirmative defense which imposes the burden upon the one asserting it to prove every element necessary to establish it (citing cases)."

As shown in 37 C. J. 1243, note 59, and 17 R. C. L. 1004 this is the majority rule. This is the rule in the State of California, First National Bank vs. Armstrong, 294 Pac.

25. This is also the rule in the State of Oklahoma, Warner vs. Wickizer, 294 Pac. 130. We quote the following paragraph from the latter opinion:

> "Where the statute of limitations is pleaded as an affirmative defense, the burden of proving it is on the one who asserts it, and where the evidence is conflicting as to whether or not the statute of limitations has run, the finding and verdict of the jury thereon will not be disturbed on appeal, if there is any evidence reasonably tending to support such verdict and finding (citing cases)."

The latter quotation is particularly pertinent to the immediate cause in view of conclusion of law No. 3 (77), wherein the trial court found, upon conflicting evidence, that the statute of limitations is not available as a defense in this case.

In the recent case of Jackson vs. United States, 24 Fed. (2d) 981, 986, it was held that this rule is enforceable as against the United States government. The latter case was reversed as to the interest feature only by the Circuit Court of Appeals (34 Fed. (2d) 241), and as so modified it was approved by the U. S. Supreme Court, 281 U. S. 344, 50 S. C. R. 294.

This rule has been adopted in the federal court for the district of California, in the case of Borland vs. Haven, 37 Fed. 394. We quote the following pertinent excerpt from page 413 of that opinion:

> "Besides the defense is an affirmative one, set up by the defendants, themselves, and it devolves

upon them to show, affirmatively, that the bar has attached, and to what part. **Now, it does not appear how much was paid more than three years before the bringing of the suit, and the court has no evidence upon which to apply the statutory bar, if any there be, to any particular part of the sum paid.** The defense therefore, on both grounds must be overruled."

The appeal taken to the U. S. Supreme Court in the latter case was dismissed, 159 U. S. 255, 40 L. Ed. 140. This case is particularly interesting because of the underscored portions of the quotation, when it is borne in mind that the evidence does not show just when any particular lot within the confiscated area was purchased by the government. Therefore, if appellant's theory as to the statute of limitations be adopted as the law generally, it could not be enforced in this cause, since the evidence admittedly fails to reveal the date of the acquisition of any particular lot or parcel by the government. The defense of the statute of limitations is an affirmative one and the party relying thereon must submit proof to support his position. Appellant has not met this responsibility and its position upon this phase cannot be sustained, even upon its own theory of the law.

APPELLEE'S POSITION RE LIMITATIONS

Appellee urges that the trial court's conclusion that the statute of limitations began to run on the date of the flooding of the property—about January 1, 1927, (76) is correct. In considering this question it must be re-

membered that appellee was not a party to any of the condemnation suits, neither did it join in the execution of the deeds from the individual landowner to the government. In no way did appellee part with any of its property rights. How can it be legally concluded that these deeds from individuals to the government affected appellee's rights in any manner? Appellee was not a party to these transactions, and it is not shown that it had actual knowledge thereof, and the record does not reveal when any of these contracts or deeds were placed of record so as to give appellee constructive notice, with one exception. The defendant's exhibit 1 does show that the contract of sale between the government and C. F. Dahlen was placed of record January 14, 1926. The present action was filed within 6 years of such date. So far as appellee's lien and property right are concerned these conveyances from the individual owners to the government had no influence whatever. Such conveyances, in contemplation of law, had no more bearing upon appellee's property than any of the conveyances of the property within these districts from one individual to another might have had. We assume that it is a matter of common knowledge that property within these various districts is conveyed from one individual to another from time to time during the life of bonds like those now before the court. Such conveyances do not affect the priority or

validity of the lien of the bond and district assessments. By the same reasoning it must be concluded that the conveyances from these individuals to the government did not affect appellee's property, and consequently did not start the statute of limitations running, so far as the present suit is concerned. It is significant that the present action does not seek redress for property of the individual property owners taken by the government, but only for property of the owners of the bonds-liens. The latter property rights were not molested until the actual appropriation and confiscation of the lands and the destruction of appellee's liens thereon, which happened about January 1st, 1927.

The occurrence which started the applicable statute of limitations running was the actual taking and appropriation of appellee's property by the government. This happened when the lands were actually possessed and flooded for reservoir purposes. With the happening of that event these lands, upon which appellee had a lien to secure the payment of its bonds, were confiscated and henceforth devoted exclusively to governmental purposes, actually destroying every claim which the appellee had thereon. In the case of Seven Lakes Reservoir Co. v Majors, 196 Pac. 334, the Colorado court considered a question almost identical with that now in hand. In the reported case a certain irrigation project built dams at

the outlets of several lakes and as a part of the system used a small creek to transport the stored water; this unnaturally large use of the stream bed caused large gulleys to be cut and considerable of the plaintiff's land to be washed away and damaged. The Supreme Court of Colorado points out that the action is either upon an implied promise to pay or upon a liability under the constitution, providing that private property cannot be taken or damaged without compensation. Several federal cases are cited. The crucial question was when the statute of limitations began to run. In concluding an extensive discussion of the problem the court held that the right of action accrued and the statute began to run at the first visible and sensible appearance of injury from the erosion and washing away of the banks, and damage to adjacent land by the running of the unusual volume of water along the channel. Several analogous cases are cited in the opinion, and appellee feels that these cases satisfactorily determine the question under consideration.

In the absence of condemnation, or some statutory procedure, for determining the value of property to be taken for a public purpose, an owner is not entitled to be paid in advance of the actual taking of his property, for he does not know until such occurrence that his property will actually be taken, or how much will be taken. The immediate action is under the Fifth Amendment, and "The Fifth Amendment does not entitle him to be paid

in advance of the taking. Crozier v Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 306, 32 S. Ct. 488, 56 L. Ed. 771." Hurley v Kincaid, 285 U. S. 95, 52 S. Ct. 267 The Crozier case thus elaborates the rule:

> "Indisputably the duty to make compensation does not inflexibly, in the absence of constitutional provisions requiring it, exact, first, that compensation should be made previous to the taking,—that is, that the amount should be ascertained and paid in advance of the appropriation,—it being sufficient, having relation to the nature and character of the property taken, that adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation; second, that, again, always having reference to the nature and character of the property taken, its value and the surrounding circumstances, the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of the government of the duty to make prompt payment of the ascertained compensation,—that is, by the pledge, either expressly or by necessary implication, of the public good faith to that end." (p 306 of U. S. report).

In considering the statute of limitations in the immediate cause appellee suggests that the following facts should be remembered. Defendant's exhibit 1, one of the standard forms of land purchase contracts used by the government (124) in acquiring this land, contains a provision (paragraph 7) authorizing the government to reserve from the purchase price to be paid for any particular tract of land such amount as may be necessary to discharge any liens or encumbrances existing against the

property at the time of the conveyance. The record conclusively shows that the United States officials chose to take advantage of this provision and reserve funds from such purchase prices to take up the amount due the appellee on the bonds under consideration and the assessments levied in connection therewith. As Mr. Bohlson, one of the clerks in charge, testified:

> "* * *We held out an amount from each property owner that was estimated to be sufficient to retire any assessments against the property that might be levied in the future, on account of existing bonds." (136)

This witness also testified that all of the members of the reclamation force knew of these outstanding bonds (136). Mr. Banks, the chief engineer, testified that he had knowledge of these unpaid improvement bonds, and he stated:

> "* * *I think that the government retained the sum of from $13,000 to $14,000 until sometime in 1929 before they paid it to the landowners; it was withheld for the purpose of paying any reassessments that might be held valid liens." (134).

Witness Davie stated that when the government purchased his property it temporarily withheld money for such purposes for two or three years (121). Witness Sparks, the mayor of American Falls, testified in part as follows:

> "When settlement was made for my property, there was an amount held up to cover contingencies arising in case there was not enough money from these sidewalk and sewer assessments to retire the bonds; this was in addition to the amount held back for the payment of current taxes, a mort-

> gage and the payment of the balance of the ten annual assessments on my sewer and sidewalk * * *
>
> "* * * it was commonly known around town that a portion of the money due each property holder in the district was withheld by the government for that purpose." (122-3).
>
> " * * * Some deductions were made in purchases about the year 1923; * * *" (124).

There is considerable other testimony along these lines. Unquestionably the court's twenty-fourth finding (75) is amply supported by the evidence. Such finding is to the effect that at the time of the taking of the property by the government the government officials in charge knew that the assessments levied to pay the bonds held by appellee were insufficient to pay and discharge the unpaid amounts thereof and that the holders of the bonds would be deprived of the amount due thereon unless the government paid it; and that at the time of the taking of this property by the United States it withheld from the record owners of the property amounts sufficient to fully pay and discharge appellee's claim, in addition to amounts withheld to pay general taxes, mortgages, etc.

So long as the government was thus recognizing appellee's claim, and so long as the government was thus taking precautions to guarantee that appellee's bonds would be paid, the appellee would not have been justified, morally at least, in instituting a suit against the government. But as soon as the appellee learned that these moneys were being paid to the record owners, which was

some time in 1929 (134), certainly appellee was justified in concluding that its bonds would not be paid, since the government was no longer recognizing their validity. Since these land purchase contracts authorized the government to withhold money to take up appellee's bonds and the reassessments levied to pay the same by holding this money in an amount sufficient to take up the unpaid balance on the bonds, the government in fact impliedly promised to pay such moneys to those entitled thereto on demand. When the government paid these withheld moneys to the record owners, and not to appellee, the government thereby repudiated this implied promise and made it necessary for suit to be instituted. In this connection it should be remembered that the reassessment ordinances were enacted July 3, 1928 (plaintiff's exhibit 16), which was several months prior to the time this withheld money was turned over to the record owners by the government.

Concluding this branch of the case, appellee urges that under the applicable law the government became liable to the appellee for the taking of its property when the reservoir site was flooded and the lands upon which appellee held a lien became submerged and confiscated. However, since at this time the government was withholding money to pay appellee, thus fully recognizing appellee's claims and rights, and serving in the capacity as a trus-

tee to insure the payment of appellee's claims, it probably would not have been proper for the appellee to have instituted suit at that time. However, immediately upon the government's repudiating this trust and paying the money to the record owners suit was justified, in law and in equity. It is not necessary to determine, for the purpose of the immediate controversy, whether appellee's cause of action accrued when the reservoir was flooded, or when the government repudiated its trust and paid the money to the record owners, because the suits were instituted in 1929 and 1930, both of which dates are clearly within the six year statute period from the date of the flooding or the date of the repudiation of the trust.

This phase of the controversy is somewhat similar to the situation involved in the case of United States v Wardwell, 172 U. S. 48, 43 L. Ed. 360. In that case the statutes required the government officials to hold certain money in the treasury for the benefit of those whose currency might be destroyed by Indians, etc. The money was to be paid upon proper demands being made therefor. The demand was not made for a number of years, and when suit was brought, the statute of limitations was plead. The court held that the liability of the government continued until there was a direct repudiation of the liability on the part of the government, and that the statute of limitations did not begin to run until such re-

pudiation. So in the present case as long as the government was withholding the money to pay the appellee for its bonds, it is likely that suit could not have been properly instituted.

The case of United States vs. Taylor, 104 U. S. 216, 26 L. Ed. 721, is also somewhat similar. There the statute required the government, when selling property to satisfy tax claims of the government, to pay to the owner of the property any surplus that might remain after the taxes, interest, and costs should be satisfied. A certain piece of property was sold in 1865 for considerably more than the amounts due the government; in 1874 demand was made for this surplus. The demand was rejected and suit was filed about a year later, or more than ten years after the date of the sale. The court held that the six year statute of limitations did not begin to run until the demand was made and refused, since the government held the money in the capacity of a trustee. The same holding was approved in the case of United States v Cooper, 120 U. S. 124, 30 L. Ed. 606.

STATE STATUTES OF LIMITATIONS

On pages 48-51 of appellant's brief six sections of the state statutes, prescribing limitations for various forms of actions, are cited, and the argument is made that these state statutes apply to and bar the present action.

The present action is brought under 28 U. S. C. A. sec.

41, subd. 20, which is a part of the Tucker act. This section authorizes suits against the United States upon express or implied contracts, etc. The section contains the following sentence:

> "No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought **within six years** after the right accrued for which the claim is made."

Thus the Tucker act itself authorizes the action and fixes the period of limitations, and the situation is brought directly under the provisions of the exception in 28 U. S. C. A., section 725, which provides as follows:

> "The laws of the several States, **except where the Constitution, treaties, or statutes of the United States otherwise require or provide**, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Among the annotations contained in USCA, following the last quoted section, will be found a number of cases on pages 237 and 238 showing that where a federal statute fixes the period of limitations state statutes of limitations are not applicable. An extensive discussion of this proposition would not seem to be necessary because the decisions are unanimous. All these cases hold that where a statute of the United States affords a remedy and imposes a limitation on actions thereunder, the statute of limitations of the states have no application. A charac-

teristic disposition of this question may be found in the case of United States v Boomer, 183 Fed. 726. We quote from page 730 of the opinion in that case:

> "The fixing of a period of one year in chapter 778, 33 Stat. 811, within which the action created by that statute should be commenced, was an exercise of the soverign power of the United States, and may not be repealed or modified by state legislation. It is true that the courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states and give them the same construction and effect which are given by the local tribunals. But in the case at bar Congress chose to enact its own statute of limitation, and hence section 721, Rev. St. U. S. does not apply."

The case at bar comes within the exception noted in 28 U. S. C. A. sec. 725, in that the federal statute creating the right to sue likewise fixes the period of limitation. Therefore, the state statutes of limitations have no bearing.

NATURE OF APPELLEE'S PROPERTY

Before considering the phase of the case dealing with the basic applicable principles of law perhaps it would be well to point out to the court the exact nature of the property invovled. It is true that the property referred to is in the form of bonds. However, these bonds are quite different from the average negotiable bonds which one naturally thinks of when the expression "bonds" is used. As pointed out in the statement of facts these bonds were issued under the local improvement district statutes

of the State of Idaho. There is no personal liability upon these bonds on the part of the improvement districts, or the cities within which such districts are located or the general taxpayers. In fact there is no personal liability at all, except, of course, in cases of misconduct in office, etc. In the recent case of Cowart v Union Paving Co., 14 Pac. (2d) 764, 767, the Supreme Court of California thus tersely summarizes the situation:

> "There is a **moral obligation** resting upon the property owners benefited by the improvement and an equitable right against the property itself, which the Legislature has power to legalize and enforce. (citing cases)."

In the case of New First National Bank v City of Weiser, 166 Pac. 213, the Idaho Supreme Court discusses the general statutes governing these bonds and the general force and effect of the bonds. This case is cited in Judge Cavanah's memorandum opinion. For the purposes now under consideration the following paragraph contains the important conclusions of that case:

> "The remedy of the bondholder in case a property owner fails to make payment of the taxes assessed against his property is not against the city nor the improvement district, nor against the person who has paid the sum due from him but against the property of the delinquent."

This decision is in accord with the provisions of C. S. section 4026, which provides as follows:

> "The holder of any bond issued under the authority of this article shall have no claim therefor

> against the municipality by which the same is issued, in any event, except for the collection of the special assessment made for the improvement for which said bond was issued, but **his remedy, in case of non-payment, shall be confined to the enforcement of such assessments.** A copy of this section shall be plainly written, printed or engraved on the face of each bond so issued.''

As shown at page 19 of the record this provision was appropriately inserted in the bonds involved in this litigation. To the same effect see the Supreme Court's opinion in the case of Moore v City of Nampa, 276 U. S. 536, which involved analogous improvement districts, and wherein the U. S. Supreme Court held:

> ''It is clear that respondent's (the city) faith or credit is not pledged and that the value of the bond depends upon the validity and worth of the assessments.''

The Supreme Court of Idaho ''has specifically and repeatedly held that where a special assessment district is created and bonds issued, the same are not general obligations of the municipality.'' Hughes v Village of Wendell, 275 Pac. 1116.

In the case of Bosworth v Anderson, 280 Pac. 227, the Idaho Supreme Court was again considering similar bonds. The court held that,

> ''the lien of the bonds upon the lands of the improvement district become fixed and paramount to any other lien except those of the general state, county, and city taxes.'' (230).

As provided by C. S. section 4007 this lien may be fore-

closed in accordance with the provisions of the code of civil procedure.

It should be remembered that these bonds are but the evidence of the obligation created by the assessments; the only lien is that created by the assessments, and bonds are only issued to permit payments to be made in installments over a period of years. Balaam v Pacific States Sav. & Loan Co., 15 Pac. (2d-Cal) 186.

Thus it appears from these statutory provisions and court decisions that the bonds in question are liens upon the land in the respective districts, and nothing more (25 R. C. L. 174). These bonds represent an interest in the land, and when the United States confiscated and appropriated the land in these improvement districts it likewise confiscated and appropriated appellee's bonds and every element of its property represented thereby, because independent of the land the bonds are emphatically worthless. In contemplation of law the rights of the owners of these bonds are on a parity with the owners of any real estate mortgages in the same territory, and certainly when the government's land purchase contracts (see paragraph 7 defendant's exhibit 1) authorized the government to withhold enough funds from the purchase price of the lots in the district to remove liens or encumbrances existing against the property, such contracts empowered the government officials to withhold funds to pay these bonds

and the reassessments based thereon. In fact the government officials, until sometime in 1929, withheld moneys for said purposes.

LIEN IS PROPERTY RIGHT

Having shown that these bonds were nothing more than mortgages upon the land in the district and that the reassessments were justified in fact and valid in law, the next inquiry which naturally arises is, whether or not such a lien or encumbrance upon the land is such a property right as will be recognized in applying the fifth amendment to the United States constitution, which provides that private property cannot be taken for a public purpose without just compensation.

This question is answered in the affirmative by the decision of the case of Morgan v Willman, 58 A. L. R. 1518, and the annotation beginning on page 1534. In brief this opinion and annotation show that the courts universally hold that the interest of a mortgagee or encumbrancer in property taken under the power of eminent domain is property within the meaning of constitutional and statutory provisions prohibiting the taking of private property for public use without compensation. The annotation refers to one case in the U. S. Supreme Court (see page 1535). See also, the case of Ill. Trust & Sav. Bank v City of Des Moines, 224 Fed. 620, where it is said that "It is fundamental that a mortgage or trust deed, securing an indebt-

edness, is "property" within the meaning of the Constitution of the United States and the Constitution of the state of Iowa." An extended discussion of these authorities does not seem necessary, but reference may be had to 19 R. C. L. 343.

On page 1539 of the annotation in 58 A. L. R. the statement is also made that where only a part of the mortgaged property is taken, the mortgagee is entitled to pro rata compensation. The court's attention is directed to this to support the trial court's conclusion and judgment as to appellee's rights in the district No. 9, where only part of the district was taken for government purposes.

VALIDITY, NATURE, AND EFFECT OF THE REASSESSMENTS

In a general way this subject is discussed on pages 29 to 35 of appellant's brief. On page 29 appellant likens the claim of appellee to that of the holder of a general bond or warrant of a municipality. The very obvious distinction is to be found in the fact that a holder of a warrant or general bond of a municipality relies exclusively upon the financial responsibility of the municipality issuing such bond or warrant. In such case the municipality is personally liable and no lien exists against any particular parcel of land. As pointed out on pp. 28 to 31 hereof, just the reverse is true of the bonds involved in this litigation.

The statement on page 30 of appellant's brief that the action of the government has been beneficial to appellee in that delinquent taxes have been paid up is pure speculation. No one can say that these would not have been paid up if the reservoir had not been constructed. On the other hand, it might just as logically be suggested that the possibility of the building of the reservoir, hanging over the citizens for a number of years, materially hampered business and deterred owners in paying taxes, thereby substantially decreasing the payments made upon appellee's bonds.

Appellant states that the flooding of this land "did not prevent the operation of the state law permitting reassessments," and again it is argued that it was the purchase by the government, rather than the flooding of the property, which injured appellee. Throughout this argument, as well as throughout the entire brief, appellant's counsel apparently lose sight of the fact that appellee did not join in the execution of the deeds whereby the lands in this litigation were conveyed to the government. For this reason the conveyances did not in any way affect appellee's interest in such lands (44 C. J. 806).

It should also be borne in mind that these reassessments became effective July 3, 1928 (exhibit 16), at which time ordinances numbers 122 to 125, inclusive, were enacted. No objection was made to these reassessments, and for all questions involved in this litigation the same must be

considered as valid and effective. At the time these reassessments were enacted, and until some time in 1929 (134) the government had in its possession and under its control ample funds to pay the appellee the amounts owing it upon these bonds. Since the reassessments were valid and were enacted before this money was refunded to the landowners, there would seem to be no reason in law or fact why the government should not be bound thereby.

Reassessments of this nature are so generally upheld that an extensive citation of authorities would not seem to be necessary (12 C. J. 1265). In the case of Kadow v Paul, 274 U. S. 175, the U. S. Supreme Court had occasion to consider reassessments very similar to those involved in this case. In that case the Supreme Court stated that supplemental assessments are recognized as a legitimate part of the proceeding necessary to raise the money and pay bonds of this nature, "and if in the process of collection it shall appear that some of the assessed land fails to pay the assessment and is appropriated and sold, the distribution of the deficit thus arising to be included in another assessment is only meeting the to be expected cost of the improvement." Several cases are cited to support this conclusion. As pointed out in a quotation contained in the case of Kuehl v City of Edmunds, 157 Pac. 850, 853, reassesments are resorted to most frequently in cases where the original assessments are based upon er-

roneous estimates; however, they are legal and permissible in cases where "the cost of the improvement has been computed erroneously, and the assessment has been levied for too small an amount to meet the cost of the improvement." As stated in the rather recent case of Klemm v Davenport, 70 A. L. R. (Fla) 156, 161:

> "Aside from the question of double taxation, the principle is well established in this country that in addition to his proportion of a laid tax a taxpayer may be required to pay an additional amount to make up deficiencies caused by the neglect or inability of other taxpayers to pay their assessments, * * *(citing a number of cases on pp. 161-2)."

In addition to these decisions, announcing the general rule, reference is had to two applicable Idaho statutes, containing duplicate authority for reassessments under such circumstances, towit, C. S. secs. 4024 and 4141, the former providing in part that,

> "Whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by owners of property in the local assessment district where the same is made, it shall be lawful * * * to make reassessments on all the property in said local district **sufficient to pay for such improvement** * * * ."

It is the evident intent and purpose of the statute that the improvement shall be fully paid for. This thought is thus expressed in the case of Norris v Montezuma Valley Irr. Dist., 248 Fed 369, 373:

> "In order to give full force and effect to every

portion of the statute there must not only be an assessment and levy, but the debt must be paid. The statutory obligation of a municipal corporation or quasi municipal corporation to pay its debt, or to fix a rate of levy necessary to provide the amount of money required to pay its debt is not satisfied by an assessment and rate of levy sufficient to pay the debt if the taxes are collected, **but requires that there be a sufficient assessment and levy and collection of the taxes as levied to actually pay the debt.**''

The same thought is likewise reiterated by the Supreme Court of California in the recent case of Cowart v Union Paving Co., 14 Pac. (2d) 764, 767:

> ''The purpose of the reassessment act is that land benefited by an authorized public work shall not escape the payment of its proportionate share of the expense thereof. The essentials of jurisdiction to order a reassessment are that a public improvement has been made, that an assessment has been imposed or attempted, and that payment thereof has not been had.''

Section 4007 of the Idaho statutes provides:

> ''Whenever any expense or cost of work shall have been assessed on any land the **amount of said expenses shall become a lien upon said lands,** which shall take precedence of all other liens, and which may be foreclosed in accordance with the provisions of the Code of Civil Procedure.''

Thus it is clear that the ''amount of said expenses'', rather than the amount of the assessment, determines the [illegible] and extent of the lien, and if the assessments are not made large enough to pay the full expense of the

work, the lien remains effective until such expense or cost of the work shall have been paid. Therefore, when the government took this property, the full amount of the cost and expense of the work not having been paid, it took it subject to the lien of the unpaid amount thereof. The reassessments did not make nor alter the liens already in force, but merely served to definitely fix the unpaid balance owing the bondholders. As the trial court stated on p. 4 of its opinion on the merits:

> "The law of the state provides that whenever the original assessment is insufficient to pay the costs for the improvement the city must reassess the property for an amount sufficient to pay them, (I. C. S. Sec. 4024). The purchasers of these bonds had a right to assume that should it turn out for **any reason** that the original assessment would be insufficient to pay the bonds in full that the city had authority to reassess the property upon which a lien is given to make up any deficiency. **The statute became one of the obligations of the bond.**"

In connection with the foregoing it seems proper to refer to the cases cited on page 32 of appellant's brief. These cases hold in substance that property of the United States is immune from taxation at the hands of the state or local municipalities. Predicating its stand upon this generally recognized rule, appellant argues that when the government purchased these lots the power of reassessment was cut off. The answer to this contention is to be found in the effect and priority of the lien of the reassessments. Such reassessments and the lien created there-

by are not new but a mere continuation of the original assessments and the liens thereof. The lien of the reassessment is part and parcel of the lien of, and relates back to, the lien of the original assessments. Both the original and reassessments are one and the same in contemplation of law. Any person acquiring land within an improvement district does so with the full knowledge of the fact of the assessments of the improvement district and the consequent power to make reassessments to pay any outstanding bonds of such district.

As was said in the case of Columbia Heights Realty Co. v Rudolph, 217 U. S. 547, 554:

> "Such a reassessment was but a continuance of the original proceeding, it might well be done by an amended but supplementary petition by virtue of the authority of the new act."

To the same effect see Reiff v City of Portland, 141 Pac. 167, where it is said:

> "The reassessment was, in a sense, a continuation of the original assessment proceedings."

To the same effect see the case of Duniway v City of Portland, 81 Pac. 945, 950; and 25 R. C. L. 170, note 8. It is pointed out in the case of Beezely v Astoria, 269 Pac. 216, that reassessments are supplementary to the original assessments, and that in case of the failure of the original assessments for any reason, reassessments may be resorted to, since the intent of the law is that the lien shall continue until the debt is extinguished.

The lien of the reassessment relates back to the original assessment, Commissioners of Sinking Fund v Linden, 40 N. J. Equity 27. The syllabus in the latter case is as follows:

> "In 1873 the township of Linden opened and graded an avenue, and caused an assessment for its share of the costs thereof to be laid on the land in controversy. In 1874 the owners of that land gave a mortgage thereon to complainants. In 1879, defendants being advised that the assessment was invalid, caused a re-assessment of the premises to be made, under a statute passed in 1878, which provided for re-assessments, and that from and after the filing of the map and report of the commissioners, the assessments should be and remain a lien on the property assessed, notwithstanding any devise, descent or alienation thereof, or any judgment, mortgage or encumbrance thereon. The complainants became the owners of the premises in 1880, under foreclosure of their mortgage, to which suit defendants were not made parties. On a bill to compel defendants to redeem—Held, that the statute of 1878 is constitutional, and that the lien of the re-assessment related back to the time of the original assessment, and was, consequently, prior to that of complainant's mortgage."

See also Hibben v Smith, 62 N. E. 447; McCartney v People, 66 N. E. 873; and Shaw v Snohomish, 28 LRANS 735, and note.

Under the foregoing authorities the appellee's claim against the property so taken by the government was a lien or encumbrance upon such property, which originated in 1915 and 1916 and continued unabated until destroyed by the government. The fundamental purpose of

such lien was to insure the full and complete payment of the obligation, and since the original levy was not sufficient to do this, the new levy and reassessment must be given the same force and effect as the original. Therefore, when the government confiscated this property early in 1927, it did so with both actual and constructive knowledge of the existence of appellee's claim upon the property. It had actual knowledge through its officials in charge, who went so far as to hold back money to pay these bonds for several years; and it had constructive knowledge because the existence of the districts and bonds was a matter of record, and the possibility of reassessments was likewise known to appellant because the same is provided by the statutes of Idaho. For these reasons the situation is entirely different from the situations involved in the cases cited on pages 32-34 of appellant's brief. In those cases and with the average ad valorem tax levy a new lien is created each year for the taxes for such year, but in the case of the improvement district like those now under consideration the lien is created when the work is done and it is not removed until the work is fully paid for.

IMPLIED CONTRACT-TAKING

It has been the constant holding of all state and federal courts for a number of years that there is an implied promise to make compensation where private prop-

erty not owned by the government is taken pursuant to an act of Congress and applied to public use. Perhaps the key case upon this question is that of United States v Great Falls Mfg. Co., 112 U. S. 645. This doctrine has been adopted by the Supreme Court of Idaho in the case of Boise Valley Construction Co. v Kroeger, 105 Pac. 1070. It has been reiterated and followed innumerable times by many state and federal courts. Among the more recent cases in the U. S. Supreme Court are those of United States v Cress, 243 U. S. 316, and Phelps v United States, infra page 66. A case wherein the facts are more similar to those in the immediate cause is that of Snowden v Fort Lyon Canal Co., 238 Fed. 495. In the latter case an irrigation company, authorized to condemn land for its works, constructed a reservoir on the land of the plaintiff without condemnation proceedings. It was held that by taking this property for such purpose the canal company impliedly agreed to compensate the owner therefor. Several leading decisions of the U. S. Supreme Court are cited and quoted from, among them being the Great Falls Mfg. case above referred to. See also, International Paper Co. v United States, 282 U. S. 399.

The case of United States v Lynah, 188 U. S. 445, is also a leading case upon this question. In the latter case certain dams and obstructions were placed in the Savannah River, with the result that the raised water backed up against plaintiff's river embankment and interfered with

the drainage of his plantation. The court held this to be a taking of private property, requiring compensation under the fifth amendment notwithstanding that the work was done by the government in improving the navigation of a navigable river. The raising of the water above its natural level was held to be an invasion of the private property so overflowed. In the immediate case, as in the Lynah case, the government has constructed public works, raising the natural level of a water course beyond its banks, and has thereby overflowed and appropriated the private property of the plaintiff—appellee. It is difficult to imagine a case coming more directly within the principle so often enforced by the Supreme Court of the United States than the present case. As pointed out on page 470 of the Supreme Court's opinion in the Lynah case, when the government constructs such a dam and floods the property of an individual to such an extent as to substantially destroy the value of the land, there is a taking within the scope of the fifth amendment. While the government may not have appropriated appellee's title, yet it has taken away the use and value thereof, so that what is left is of little consequence, and it might as well be concluded that the government has taken the absolute fee of appellee's property. It would be useless to extend the citation of cases upon this point, because the principle has become firmly imbedded in the laws of the

United States, and is universally recognized by all courts.

However, there is one other case, which is of particular interest, because of the similarity of the "property right" taken by the government. In the case of Tucker v United States, 283 Fed. 428, complainant had a right of way or easement over certain lands, which lands were wholly taken by the government for naval training purposes without compensation to complainant. After citing and quoting from several leading cases, the court said:

> "In the present case it appears that, before perfecting a title by purchase, but with the consent of the owners of the fee, and **in expectation of thereafter perfecting title**, the United States took possession of the Coddington Point land. The continued holding of possession of the land, and the erection of buildings, fences, and other constructions thereon, under governmental authority and for governmental use, resulted in such an appropriation as would, in any event, give a right of action against the government (in favor of the owners of the easement). U. S. v. North American Co., 253 U. S. 330, 334, 40 Sup. Ct. 518, 64 L. Ed. 935."

Under the case cited above, tending to show that appellee's bonds constitute a property right, to-wit: an encumbrance upon the property in the districts, and that this lien or encumbrance has been destroyed by the flooding of the land in the district, no one can intelligently state that appellee's property has not been taken by the government for this public purpose, and since the appellee admittedly has not been paid, it must also be admitted

that the government took the property without compensating appellee therefor. It is difficult to conceive how one could take the position that the property has not been taken in a constitutional sense, because the appellee's only property is a lien or encumbrance upon the land, or an interest in the land, and the land has been completely and absolutely confiscated and appropriated by the government for reservoir purposes for all times.

On page 24 of its brief and at other points following the appellant takes the position that when the government officials were taking possession of this reservoir site they claimed ownership and exclusive title to all the property and did not recognize any right, title, or interest in appellee. With due respect to appellant's counsel we do not believe that the record substantiates this position. On page 25 of its brief appellant quotes from the testimony of Mr. Banks, the government engineer in charge of the construction work, wherein he states that he claimed title to the full property in the government and did not recognize appellee's interest. If this were the only showing in the record upon this point, there might be some support for appellant's position. The court's attention is directed to the testimony of this same witness on page 134 of the record, where he states that the government withheld $13,000 to $14,000 "for the purpose of paying any reassessments that might be held valid liens." On

page 136 the testimony of Mr. Bohlson, another government employe, is to the effect that money was deducted from the purchases "to protect the United States against the possibility of other assessments in the various improvement districts." On the same page he further states that they held out enough to retire any assessments that might be levied in the future on account of existing bonds, and the following words are also taken from his testimony:

> "All of the representatives of the government that had anything to do with the acquiring of title knew that these bonds were outstanding along sometime after the reports to that effect got out that the bonds were not all being retired."

On page 137 he states that the money was withheld pending a decision as to the validity of the lien. These are the only two witnesses submitted by the Appellant. Appellee's witness Davie stated that money was held out of the purchase price of his property for the same purpose (121); witness Sparks, mayor of American Falls, testified to the same effect (122), and the latter witness further testified that "it was commonly known around town that a portion of the money due each property holder in the district was withheld by the government for that purpose." Witness Sparks also testified that "Some deductions were made in purchases about the year 1923 * * * The amount of these temporary suspensions were returned without comment to the land owners; * * *" (124). Upon the

strength of this testimony, the trial court found, as pointed out on the bottom of page 25 of appellant's brief, that the government officials recognized the rights of appellee at the time of the taking of this property for this public purpose. In view of this showing and finding we cannot understand how appellant's counsel can take the position that the government officials took possession of appellee's property without recognizing appellee's claim.

Bearing in mind the above mentioned evidence and finding, to the effect that the government officials recognized plaintiff's claim at the time its property was taken, the following quotation from the case of Tempel v United States, 248 U. S. 121, 131, seems particularly pertinent:

> "Under such circumstances it must be assumed that the government intended to take and to make compensation for any property taken, so as to afford the basis for an implied promise. **And when the implied promise to pay has once arisen, a later denial by the government (whether at the time of suit or otherwise) of its liability to make compensation does not destroy the right in contract and convert the act into a tort.**"

The Tempel case is quoted from extensively on page 26 of appellant's brief. It is true that the claim for compensation in the Tempel case was denied. In that case the government was merely dredging a deeper channel in a river bed already flooded and in use for navigation purposes. The facts are entirely different from the present

case where citizens were ousted from their homes and business houses to permit the building of a reservoir. Appellee had a lien upon such lands, homes, and business houses, that lien has been destroyed but the government has not compensated the appellee for his lien.

The above quotation from the Tempel case is quoted and approved in the case of Tucker v United States, 283 Fed. 428 (supra page 44), which is very analogous to the immediate case. In the Tucker case the court adds these pertinent words:

> "The United States does not claim that it had title to that property which the petitioners claim to own, nor a right to take such property rights without compensation, if such rights existed. Its denial of plaintiff's title is not an assertion of its own title to the property, which plaintiffs say has been destroyed."

The only title or property rights the government claimed, or could lawfully claim, when its officials took possession of the American Falls reservoir site and ousted appellee, were the rights which the government acquired through the conveyances from the various individuals, or through the condemnation proceedings. In the condemnation proceedings the government only acquired the rights of those who were made parties to such actions (Ill. Trust & Sav. Bank v City of Des Moines, 224 Fed. 620), and of course neither appellee nor its predecessor in interest was party to such proceedings (71). In the

cases where the lands were acquired by the government by private conveyances from the owners of the fee, without the owner of the bonds and liens joining such conveyances, the liens were not affected (44 C. J. 806, notes 44-5-6).

An extensive discussion of all the cases cited by appellant upon this general proposition is hardly in place, but a few will be referred to. On page 23 it cites the case of Hill v United States. In that case the plaintiff sued the United States for the use and occupation of land for a lighthouse. This land so occupied by the lighthouse was submerged land in Chesapeake Bay. Patently the situation is entirely different here. On the same page the case of B. & O. Railway Co., v United States is cited. That case was under the Dent act, and the court denied compensation. The court found that the government authorities did not order the work done, but rather the work for which compensation was claimed was voluntarily undertaken by the claimant, without anything having been said about pay, etc.

On the same page he cites and quotes from the case of Omnia Commercial Co. v United States. As the U. S. Supreme Court recently said of that case:

> "We perceive no difficulty arising from the case of Omnia Commercial Co. v United States * * * There the taking of the whole product of a company went no further than to make it practically impossible

> for that company to keep a collateral contract to deliver a certain amount of steel to appellant.'' International Paper Co. v United States, 282 U. S. 399, 408.

EXTENT OF JUDGMENT

Beginning on page 36 of its brief appellant contends that the judgment rendered by the trial court gives more relief against the government than could have been granted had an individual been defendant. Its argument is predicated on three grounds.

The first one (a) is that the appellee's sole remedy is for the foreclosure of the liens of the assessments. In connection with this argument it is stated on page 38 of the brief that the United States has paid the owners of the property the full value of the property, and also has ''paid all taxes and liens of every nature which then existed against said property.'' It has already been shown that the government took this property with full knowledge of the claims on the part of appellee and until some time in 1929 held out sufficient funds to satisfy appellee's claim, but later changed its program and paid this money to the owners of the fee. It has also been shown that appellee held liens against the property taken by the government for reservoir purposes, which are not yet fully paid.

Appellant contends that the sole remedy of appellee, as such bondholder, was an action to foreclose its lien,

and on pages 42 and 43 cites authorities holding that one cannot have a personal judgment upon a debt secured by a lien until the security is exhausted. In brief, appellant seems of the opinion that we should have foreclosed our liens and taken a deficiency judgment. Under ordinary circumstances this, of course, is the case, but the law does not require one to do a vain and useless thing, and when the security has been absolutely confiscated and appropriated by some third party, as is true in the immediate cause, the law does not require the appellee to go through the empty formality of foreclosing a lien upon the shadow of his security. Where the security has been exhausted, "necessarily there is nothing to foreclose and as a general rule the action may be brought to enforce the claim as though it had never been secured." 18 Cal. Jur. 249. Such is the rule in Idaho,—Warner v Bookstahler, 282 Pac. 862. The government, through its duly authorized officials, has placed this security beyond the reach of the courts and has completely destroyed the security of appellee's claim for all legal considerations.

Without the consent of appellee the government has appropriated the property against which appellee held a valid and unpaid lien, and in law and equity the appellant is liable to appellee therefor. As stated in the case of Morgan v Willman, 58 A. L. R. 1518, 1532, the owner of property taken for a public use is guaranteed just com-

pensation for the property so taken; it is not sufficient that the confiscator pay the full value of the property taken to the owner of the fee without paying the mortgagee his claim; the mortgagee must be paid the amount that is due him, and if the appropriator does not see that the mortgagee is so paid, such appropriator may be held to pay a second time. In the latter case it is further pointed out that if such a rule results in hardship it is only due to the conduct of the officers in charge, and the mortgagee should not be made to suffer because thereof. On page 38 of its brief appellant suggests that such a result is "absurd". However, the Missouri case just quoted from is supported by the majority view, as shown in the annotation beginning on page 1534 of 58 A. L. R.

Appellant's second ground for asserting that the relief afforded by the judgment is excessive is that the recovery should be limited to the market value of the property and not to the amount due upon the bonds. This premise is stated on page 36 and argued in more detail on pages 43-4 of appellant's brief. It is contended that the maximum amount for which judgment could have been rendered would be the market value of the lots minus the total of the liens superior to the assessment liens in question. Again appellant misconceives the nature of the appellee's property. As already pointed out the bonds held by appellee merely evidence the obligation created by

the assessment (Balaam v Pacific States Sav. & Loan Co., supra). The property actually taken by appellant was appellee's interest in the land submerged by the reservoir—its lien against the property within the improvement districts in question. As pointed out on page 30 hereof the Supreme Court of Idaho has held that the lien of similar bonds is "paramount to any other lien except those of the general state, county and city taxes." Therefore, when the government confiscated the lands in question, it should have first paid the general city, county and state taxes and then paid appellee's bonds, before paying over any money to the owner of the fee. Since these bonds constituted a first lien against the property in the respective districts, except for city, county and state taxes, and since neither the property owner nor the municipality is personally liable thereon, the land lien constituting the only value of the bonds, the amount due upon the bond debt represents the market value of appellee's property so confiscated and appropriated, unless it be shown that the property so taken was actually worth less than the amount due upon general taxes and upon these bonds.

On page 43 of appellant's brief it is argued that the record contains no support of the trial court's findings that the value of the property taken exceeded the claim of appellee upon the bonds. While there is no direct testimony as to the value of each and every lot, yet as pointed

out on page 45 of this brief, the government officials when buying this property held out from the purchase prices $13,000.00 to $14,000.00 for the purpose of paying these reassessments. Patently if the property had not been worth more than $13,000.00 or $14,000.00 the government officials could not have withheld this much money, because the very act of withholding assumes that something was paid to the owners of the fee over and above the amount so withheld. The amount so withheld is greatly in excess of the amount of the judgments rendered in both the cases now before the court, as the total of the judgments is less than $10,000.00. This is ample evidence to support the trial court's findings that the property taken was greatly in excess of appellee's claim (72).

The general rule, both in Idaho and in the United States courts, is that the market value of property taken for public purposes is the measure of damages. This market value is estimated by reference to the uses for which the property is suitable and customarily used. This rule is announced by the Idaho court in the case of Idaho Farm Development Co. v Brackett, 213 Pac. 696. The latter case cites decisions from the U. S. Supreme Court and many other courts. The market value of appellee's property so taken was the amount due upon its obligation, and this is the amount in which the trial court gave judgment.

The third ground upon wihch the appellant claims the trial court's judgment is excessive is that the lots were not subject to reassessment under state law. The premise is stated on page 36 and argued more in detail on pages 44-47 of appellant's brief. The validity and general effect of these reassessments is argued in detail beginning on page .... of this brief. This argument will not be repeated here. The court is respectfully requested to refer to such portion of the brief in connection with this argument.

On page 46 of appellant's brief the statement is made that no attempt has been made to show that the original assessment was not sufficient to pay the actual cost of the work. In making this statement appellant's counsel apparently overlooked the contents of plaintiff's exhibit No. 16. This exhibit contains ordinances Nos. 122 to 124 of the City of American Falls, which are the reassessment ordinances enacted July 3, 1928. For the convenience of the court we quote the following, which in substance is contained in section 1 of each of these ordinances, to-wit:

> "Section 1. That from some cause, mistake or inadvertence the assessments heretofore levied under the provisions of Ordinance No. 55, of the Village (now City) of American Falls, as amended, for the purpose of paying the costs of the improvements authorized by said ordinance, as amended, and for the purpose of paying certain bonds issued under authority of said ordinance to

> pay the improvements authorized by said ordinance, as amended, are outstanding and unpaid, together with interest thereon; the original assessment having been paid, but being insufficient to pay the total of said bonds and interest issued for the construction of the improvements authorized by said ordinance and amendments, and there remains due, owing and unpaid on account of said improvements the sum of $4,440.78; * *."

When the above provisions of the ordinances are compared with the reassessment statutes, which permit reassessments "whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by owners of property in the local assessment district", it is readily apparent that sufficient showing has been made to comply with the statute, and support the trial courts finding. The City of American Falls made the determination that the original levies were insufficient, and thereupon made reassessments. This determination was not for the court to make. On the contrary the court accepts the determination made by the city. The determination so made by the city, being in the form of ordinances, is final and not subject to collateral attack in this or any other proceeding. 43 C. J. 555, sec. 869.

Appellant relies as to this phase of the argument primarily upon the case of Lucas v City of Nampa, which is quoted from on page 47 of appellant's brief. The cita-

tion of this case is erroneous in appellant's brief. There is a case by the same name contained at the citation shown in appellant's brief, but the Lucas case containing the words quoted by appellant is reported in 238 Pac. 288. Appellee does not feel that the Lucas case has any particular bearing upon the questions before the court. In that case the city engineer estimated the cost of the improvement at $118,300.00, and this estimate was approved and the assessment levied. Later another ordinance was enacted, making the total assesment $160,000.00. Action was instituted to restrain the collection of the excess over $118,300.00. The court granted the injunction upon the sole ground that there was no authority in the statutes for including the excess amount. Such excessive amounts were made up of an engineer's fee of 5% of the cost of the project; a 10% commission contracted for selling the bonds; and also the bonds were contracted to be sold at less than their par value. All of these items were not only not authorized by the Idaho statutes but were in fact prohibited by the statutes and state decisions. The situation in that case is entirely different from that now before the court. The reasons for the insufficiency of the orginal levies in the immediate cases are as pointed out by witness Bowen noted on pages 10 et seq. hereof.

Statutes permitting reassessments vary in different

jurisdictions. Naturally unless the situation falls within the statute the reassessment is not permissable. For instance, in the case of School District No. 1 v City of Helena, 287 Pac. 164, cited on page 37 of appellant's brief, the court denied a reassessment because the grounds upon which the same was sought were not within the terms of the statute. Several of the other cases cited by appellant are along this general line. At the same point appellant cites two Idaho cases. We submit that the Idaho cases do not hold against reassessments in instances coming within the statute. Idaho has two statutes (C. S. sections 4024 and 4141) permitting reassessments. These statutes authorize reassessments whenever "**for any cause, mistake or inadvertence**", the original levy is insufficient. In studying this question the writers have not found any statute more generous or broader in its terms and comprehension than these two statutes. Under the majority rule and in view of the determination of the city, as contained in sections 1 of the ordinances (plaintiff's exhibit 16) reassessments were certainly justified in the immediate situation. The case of Klemm v Davenport, cited and quoted from on page 36 hereof, considers this question of reassessments rather fully and cites many cases. With apparent approval the following words are quoted from a Missouri case:

> "All the lands benefited can be retaxed whenever it appears that previous assessments are in-

sufficient. Even if the assessment in the first instance was sufficient, if collected, to pay the cash in full for said improvements, yet if, after the allowance of a reasonable time for the collection from delinquents, a deficiency exists, and the legal remedies have been exhausted for the collection of taxes, or if the assessments made have been abandoned, or remained uncollected by the authorities having the matter of the collection in charge, the writ should be granted ordering an additional assessment."

Other cases along these lines are cited and quoted from on pp. 35 et seq. hereof.

In view of these considerations it is urged that the judgment of the trial court is not excessive for either of the three reasons set out on page 36 of appellant's brief.

BONDS REPRESENT COSTS OF IMPROVEMENTS

On pages 51-2 of appellant's brief it is argued that the amended complaint in this action does not state a cause of action because it is only alleged that the original assessments were insufficient to pay the "**principal and interest on the bonds,** while the statute authorizes reassessment only when the original assessment 'is insufficient to pay the **cost of the improvement.**' " Appellant argues that the principal and interest on the bonds and the costs of the improvements are two widely different matters.

In making this argument appellant apparently overlooks the provisions of I. C. S. 4014 and 4142. The former section authorizes the issuance of bonds to provide "for

the payment of the costs and expenses" of the assessments levied upon the installment plan rather than upon a cash plan. Section 4142 contains similar provisions. The only difference being that section 4014 deals with local improvement districts, while section 4142 deals specifically with sewer construction districts. In either case the purpose of the bonds is to provide for the costs of the work being paid over a period of years rather than in one cash sum when the work is done. Some of the bonds in the immediate controversy have to do with improvement of sidewalks and others with the construction of sewers. In either case the bonds were issued exclusively for the payment of the costs and expenses of the respective improvements. Therefore, when the amended complaint alleges that the original assessments were insufficient to pay the principal and interest on the bonds, it effectively and for all legal considerations alleges that the original assessments were insufficient to pay the costs and expenses of the various improvements.

In this conection appellant again refers to the case of Lucas v City of Nampa. As already pointed out the items which were disapproved of in the Lucas case were those not coming within the meaning of the applicable statutes. No such improper items are claimed in the immediate actions and that case has no particular bearing upon the situation. The original levies and the subsequent bond issues and reassessments were all for proper

and lawful charges, as was alleged in the complaint and found by the trial court.

APPELLEE'S OWNERSHIP

On pages 53-4 and on pages 57-8, appellant argues that the amended complaint fails to state a cause of action because the date of appellee's ownership is not specifically alleged or proved. Appellant's reasoning is that, since a claim against the United States cannot be assigned, the complaint should have set out the date of appellee's ownership of these bonds, so that it would definitely appear that appellee owned the bonds before the right of action accrued against the government.

The fact is that these bonds were actually transferred to appellee in 1925, which was nearly two years before the right of action against the government accrued. This statement is predicated upon the following data:

The bonds were issued in 1915 and 1916, and purchased by J. K. Mullen, at the suggestion of the local manager of the Mullen interests, witness Greene, and the latter has been looking after collections on the bonds since their issuance (82); appellee was incorporated in 1925 (82), and has held these bonds "ever since the incorporation * * * as the assets of the corporation" (85-6); the bonds were delivered to witness Greene as the property of the two appellee corporations (92); and Mr. Mullen and witness Greene turned them over to appellee's counsel in

this action for collection (93). In view of this evidence the court found that the appellee corporation was founded in 1925 (59); that Mr. Mullen purchased the bonds and transferred them to the appellee corporation, and such corporation is now the owner and holder of said bonds (62-3); similar findings are made as to the bonds of the various districts (65 and 68). It should be remembered that these bonds are payable to bearer (17), and under the provisions of I. C. S. 5897 the same may be negotiated and transferred by delivery.

Upon this proposition the trial court makes the following terse statement on page 4 of its memorandum opinion:

> "As to the ownership of the bonds they are made payable to 'bearer' and the evidence shows that plaintiffs have possession of them and also became the owners thereof."

In view of this evidence and these findings it can be stated that these bonds have been the exclusive property of the appellee since 1925. The statute cited on page 53 of appellant's brief, which now appears as 31 USCA, sec. 203, as pointed out by the Supreme Court of the United States in the case of Seaboard Air Line Ry. v United States, 256 U. S. 655, was intended to prevent frauds upon the treasury in two main particulars: first, the government might be embarrassed by having to deal with two persons instead of one if a claim against the government could be transferred; second, such transfers might open

the way for improper influences. See also, Monarch Mills v Jones, 56 Fed. (2d) 180, 183, and Kingan & Co. v United States, 44 Fed. (2d) 447, 450. The present situation is very analogous to that involved in the cases cited in that the bonds were bought by Mr. Mullen and transferred by him to a corporation which he organized and dominated. Even though the bonds had been transferred after the right of action accrued, which is not the case, the statute relied upon by appellant would not be a bar to the maintenance of the present actions, because there is no taint of fraud and there is no possibility of any embarrassment or injury to the government because of the transfer.

It is not necessary in a pleading to set out matters of evidence nor to anticipate and negative all possible defenses which the defendant may raise. Ordinarily it is sufficient to set out the essential facts. The statute which the government cites on page 53 of its brief would constitute a defense if the facts justified it. The actual facts do not justify such a defense, and it was not incumbent upon appellee to anticipate this defense and negative the same in its pleading. This rule is recognized universally. Some of the cases are cited in Bancroft's Code Pleading, sec. 168, where the author points out that it is not necessary in a complaint to anticipate or negative a defense, and that allegations inserted for the purpose of anticipating and cutting of a defense are superfluous and im-

material, etc. For these reasons it is insisted that it was not necessary that the amended complaint allege the exact date when appellee became the owner of these bonds. In fact, it became the owner thereof before the right of action accrued, and that is sufficient.

ALLEGE LANDS NOT ACQUIRED BY U. S. AT TAX SALE

On page 54-6 of its brief appellant argues that the amended complaint does not state a cause of action because there is no allegation that the lands for the reservoir site were not acquired by the United States at tax sales for delinquent state and county taxes. The same answer may be made to this premise that was made to the preceding one, namely, that such an allegation would be anticipating a defense, would be surplusage, and also would make the pleading unduly prolix.

On page 55 appellant cites an Idaho case which holds that a lien of general taxes is prior to that of special assessments. This is immaterial in the present controversy for the reason that the government held out more than enough money to pay for the bonds held by appellee, "in addition to the amount held back for the payment of current taxes" (122), and in addition to this "hold-out" substantial sums were paid to the owners of the fee of the property taken. As already stated, this situation and the entire record substantially prove that the lands so taken

and upon which appellee had liens were of sufficient value to pay all outstanding liens and encumbrances, and in addition paid money to the owners of the fee. The actual price paid for the specific lots is not shown except in the case of one lot, which the government agreed to pay $[illegible] for (defendant's exhibit 1—page [illegible]), and except the lot of witness [illegible] from the sale of which enough was held out to pay all special assessments, the reassessments, current taxes and a mortgage ([illegible]).

On page [illegible] of appellant's brief it argues that the complaint should have alleged that appellee owned all the unpaid bonds. By reference to exhibit [illegible] it appears that the total unpaid sums on the three districts in question totalled about nine thousand dollars when the reassessment ordinances were enacted. Upon the trial the balance was found to be $[illegible]. When these figures are compared with the bonds themselves and Mr. [illegible]'s computation (Ex. [illegible]) it reasonably appears that the bonds held by appellee represent all of the unpaid bonds issued in these districts. Appellee does not concede nor believe that it is necessary to allege that it owned all unpaid bonds. If appellee owned part of the unpaid bonds it would be entitled to compensation for their destruction upon the same theory that entitles it to compensation as the owner of all the unpaid bonds so destroyed.

INTEREST

On page 56 of its brief the appellant contends that the trial court erred in allowing interest from the date of the taking of the property to the date of the trial. It is urged that this item is only proper and lawful. Appellant cites only one case, which has to do with a libel action on account of a collision, and is entirely different from the action now before the court. To substantiate the claim for interest and also the entire case the following quotation and the authorities therein cited are submitted, from the case of Phelps v United States, 274 U. S. 341, 343, which involved an action for compensation for private property taken for public use pursuant to an act of Congress, like the immediate action:

> "Moreover, it has long been established that where, pursuant to an act of Congress, private property is taken for public use by officers or agents of the United States, the government is under an implied obligation to make just compensation. That implication being consistent with the constitutional duty of the government as well as with common justice, the owner's claim is one arising out of implied contract. United States v Great Falls Manufacturing Co., 112 U. S. 645, 656, 5 S. Ct. 306, 28 L. Ed. 846; Duckett v United States, 266 U. S. 149, 151, 45 S. Ct. 38, 69 L. Ed. 216, Campbell v United States, 266 U. S. 368, 370, 45 S. Ct. 115, 69 L. Ed. 328. The distinction between the cause of action considered in United States v North American Co. 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935, and a taking under the power of eminent domain was pointed out in Seaboard Air Line Ry. v Unit-

ed States, 261 U. S. 299, 43 S. Ct. 354, 67 L. Ed. 664. Plaintiff's property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. Seaboard Air Line Ry. v United States, supra, 304 (43 S. Ct. 354); Brooks-Scanlon Corp. v United States, 265 U. S. 106, 123, 44 S. Ct. 471, 68 L. Ed. 934; Liggett & Myers Tobacco Co. v United States, 274 U. S. 215, 47 S. Ct. 581, 71 L. Ed. 1006."

"ON THE MERITS"

On page 57 of its brief appellant has a section of its brief entitled "On the Merits". An examination of this part of appellant's brief readily reveals that it is largely repetitious. The first few pages deal with the question of ownership of the bonds, which was discussed at an early point in appellant's brief and was discussed beginning on page 61 of this brief. Beginning on page 59, under the same heading, appellant again discusses the question of reassessments. This likewise has been discussed

by both parties at earlier points in the briefs.

On pages 65 et seq appellant discusses various items of the computation in the Bowen testimony, and particularly his set-up as contained in exhibit 14. On page 66 and at other points reference is made to the fact that some moneys of the district were lost in the First National Bank, which failed. By reference to paragraph 12 of the findings of fact in case No. 6868, page 57, it will be observed that the court makes due allowance for the amount of money so lost in the bank, together with interest thereon. In other words, appellee was not given any judgment for any money so lost in the bank, or the interest thereon. We fail to see how appellant has any complaint to make in this respect.

On pages 68-9 of appellant's brief considerable discussion and complaint is had relative to an item of $2916.53, which is referred to as the Forter judgment item. This matter is covered by finding of fact No. 14 on page 58 of the record in case 6868. The amount of this item, and the above bank item, with interest thereon, were deducted by the trial court in computing the amount due appellee. These items, and interest thereon, were treated by the trial court as though credited upon the bonds in due and regular course, therefore, appellant has no cause of complaint because thereof, and further discussion would seem entirely out of place.

The remaining pages of appellant's brief are either a summarization or repetition of matters already discussed.

It is respectfully urged that the government has taken appellee's property for a public use, and under long standing rules established by every court in the land there is an implied contract on the part of the government to repay the appellee the amount of its property so taken and confiscated for public purposes. The amount of the bonds, after making proper credits thereon for moneys lost in the failed bank, by reason of the failure of the officials to credit the Forter items, etc., represents the value of appellee's property so taken. The bonds are merely evidence of the property actually taken. The bonds themselves are of little value because neither the individual land owner nor the city can be held responsible thereon. By destroying the land upon which these bonds constituted a first lien, except the lien for general taxes, the government has effectively destroyed apppellee's entire property. When the government took this property, it had constructive notice of the apppellee's claim, given by the records showing the creation of the districts, in conjunction with the statutes of the state making the costs and expenses of the work, as represented by the bonds, a lien upon the land, and in conjunction with the reassessment statute, giving the officials the right to reassess when the original levies proved insufficient for any cause.

As Judge Cavanah stated, this "statute became one of the obligations of the bond." The government had actual notice of this claim on the part of appellee and for several years recognized such claim to the extent of holding out from $13,000.00 to $14,000.00 for the purpose of paying appellee, considerably more than the total of the two judgments under consideration. Despite all these considerations, and the many others revealed by the record, the government has confiscated and appropriated appellee's property completely, leaving appellee with merely the evidence of what formerly was a valuable property right. Under such circumstances it is only "consistent with the constitutional duty of the government as well as with common justice" to require the government to make just compensation for the property so appropriated for public purposes.

In view of the foregoing facts and authorities it is respectfully submitted that the judgment of the trial court should be affirmed.

BISSELL & BIRD,
Attorneys for Appellee

No. 6867

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
APPELLANT,

vs.

The JOHN K. and CATHERINE S. MULLEN BENEVOLENT CORPORATION, a corporation,
APPELLEE.

PETITION FOR REHEARING,
CERTIFICATE OF COUNSEL,
SUPPORTING BRIEF

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, EASTERN DIVISION

HON. CHARLES C. CAVANAH, District Judge

BISSELL & BIRD, of Gooding, Idaho,
for Appellee.

FILED
FEB 16 1933
PAUL P. O'BRIEN,
CLER

Filed February ...., 1933

....Clerk

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No. 6867

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
APPELLANT,

vs.

The JOHN K. and CATHERINE S. MULLEN BENEVOLENT CORPORATION, a corporation,
APPELLEE.

PETITION OF APPELLEE FOR REHEARING

To the United States Circuit Court of Appeals, for the Ninth Circuit, and the Judges thereof—

The petition of appellee, The John K. and Catherine S. Mullen Benevolent Corporation, a corporation, respectfully shows:

1. That the above entitled cause was argued and submitted to this court on the 15th day of December, 1932, and on January 23, 1933, this court made and entered its decree and opinion reversing the judgment of the district court, with instructions that judgment be entered upon the pleadings and findings in favor of the United States, and dismissing the action for lack of jurisdiction.

2. Your petitioner, the above named appellee, respectfully submits that the decree and opinion of this court, so made and entered on January 23, 1933, is erroneous in the following particulars and upon the following grounds, to-wit:

(a) In concluding that the bondholders (appellee) had no interest in, or lien upon, the property within said improvement districts at the time the government acquired title to the property for a reservoir site, which land is now under the waters of such reservoir, due consideration was not given to the construction heretofore placed upon the Idaho improvement district statutes by the highest tribunal of the state of Idaho, which construction is contrary to that adopted by this court.

(b) If it be conceded for the sake of the argument that such bonds were not in law or equity a lien upon the lands within the respective districts at the time the government acquired such property, nevertheless error was committed in reversing the trial court and dismissing the action, for the reason that the bonds themselves, independent of any lien or liens upon the land, constitute "property" within the meaning of the Fifth Amendment, and by "taking" such bonds-property for a public purpose without making compensation to the owner (appellee) an implied contract has been created to pay therefor. By completely taking away the full use and value of said bonds forever the government has effectively "taken" the bonds themselves, in a constitutional sense.

(c) The conclusion that the immediate action was instituted "too late" and not within six years of the time when "the government acquired the property for a reservoir site" does not appear to be supported by the record, and it is therefore erroneous. The record shows the

date of acquisition of **only two lots,** and the many others may or may not have been acquired within six years of the date of filing the suit on November 25, 1929. The burden of submitting this proof rested upon, but was not borne by, appellant. Also, because the government acquired the lots subject to existing liens and encumbrances, thus clearly and explicitly evincing its intention not to "take" appellee's property. This intention was further manifested by the government officials in charge holding $13,000 or $14,000 for the purpose of paying appellee's bonds "until sometime in 1929 before they paid it to the landowners" (R. 134).

WHEREFORE, Your petitioner respectfully prays that this court grant a rehearing of said cause on such terms as to this court shall seem just, and that upon such rehearing the judgment of the trial court be affirmed.

Dated February 14, 1933.

BISSELL & BIRD,
Attorneys for Appellee.

CERTIFICATE OF COUNSEL

STATE OF IDAHO
County of Gooding } ss.

Branch Bird, being first duly sworn, upon his oath deposes and says: That he is one of the attorneys for the appellee in the above and foregoing cause; that he has read and considered the foregoing petition for rehearing, together with the hereinafter contained supporting brief, and is familiar with the contents of such petition and brief, and in affiant's judgment such petition is well founded; and that this petition is presented in good faith, and the same is not interposed for delay.

Branch Bird.

Subscribed and sworn to before me this 14th day of February, 1933.

P. T. Sutphen,
Notary Public, residing at
Gooding, Idaho.

(Seal)

No. 6867

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

The JOHN K. and CATHERINE S. MULLEN BENEVOLENT CORPORATION, a corporation,
Appellee.

SUPPORTING BRIEF

IDAHO COURT'S INTERPRETATION

It is respectfully and earnestly urged that in concluding that the bondholders (appellee) had no interest in, or lien upon, the property within the improvement district at the time the government acquired title to the property now buried beneath the waters of American Falls Reservoir, this court failed to give proper weight and consideration to the laws and decisions of the state of Idaho appertaining to the situation.

The position of appellee is that the bonds and the unpaid amounts thereon are liens upon the lands in the district, not until some particular assessment is paid, but until the whole "cost and expense" of the improvement work is fully paid for. The assessment is merely one step in the program. The assessment itself does not

constitute the lien, but the entire proceedings, including the ordinance of intention, the ordinance creating the district, the levy of assessment, and the issuance of the bonds,—all are part and parcel of the program contemplated by the statutes. All these various steps are essential and culminate in the improvement, the obligation, and the lien against the property as represented by the bonds.

All these statutes enter into and form a part of the contract as fully and completely as though copied bodily into the bonds. (Fidelity State Bk. v North Fork H. Dist., 35 Idaho 797, 809, 209 Pac. 448, 31 A.L.R. 781.)

It is confidently urged that the Idaho case of Bosworth v Anderson, 47 Idaho 697, 280 Pac. 227, 65 A.L.R. 1372, affords explicit and sufficient authority for the statement that the "bonds" in question constituted a lien upon the lands in the district. This is especially true when it is remembered that the government had actual notice of appellee's claim and of its unpaid bonds at the times the government was purchasing these lands, and before all the money was paid over to the individual owners of the fee. This case was cited in both briefs filed with this court, and is also referred to in the court's opinion, but it does not seem that full significance has been given to at least a part of the quotation from the opinion in that case. In discussing the relative priority of the lien of improvement district bonds identical with those now under consideration, the Idaho Supreme Court stated (see section 10 of the opinion in the Bosworth case):

"The respondents Pacific States Savings & Loan Company, Equitable Loan Company, and Portland Mortgage Company, urge that because the assessment-roll was not filed by the county recorder, notice of the same did not become a lien and they were not charged with notice that there were assessment liens on the land on which they took mortgages. Hence the lien of the bonds is inferior to their mortgages, or at least they are entitled to have the units of assessment segregated for their benefit.

The statute does not require these assessment-rolls to be filed. All parties are charged with knowledge of the law to the effect that C. S., title 32, chap. 163, art. 6, has been complied with; **the lien of the bonds upon the lands of an improvement district becomes fixed and paramount** to any other lien excepting those of the general state, county and city taxes. (C. S., sec. 4013; Jenkins v Newman, 122 Ind. 99, 23 N. E. 683; Page & Jones, Taxation by Assessment, sec. 1068.)" (Heavy type supplied).

Article 6 referred to in the foregoing quotation is the local improvement district law so often referred to in the immediate case. The foregoing quotation seems to be directly in opposition to this court's conclusion that the **bonds** were not a lien upon the lands in the district. The Idaho court, in interpreting this law, explicitly holds that the "bonds" are a lien upon the lands in the improvement district, and that such lien is fixed and paramount to any other lien except the lien of general taxes.

Following the universal rule, this court has held (Boise Payette Lumber Co. v Halloran-Judge Trust Co., 281 Fed. 818) that where a state statute has been construed by the highest court of the state, such construction is binding upon the federal courts. In consonance with this rule,

it would seem incumbent upon this court to adopt the decision of the highest Idaho court and hold that the "lien of the bonds upon the lands" in the district became fixed and paramount.

A portion of the foregoing quotation from the Bosworth case will be found on page 30 of appellee's brief in this court. However, it may be that appellee's counsel took for granted their position that these bonds constituted a lien upon the property in the district and did not emphasize this citation sufficiently. This thought finds support on page 9 of this court's opinion, where a paragraph of appellee's brief is copied. The portion of appellee's brief so quoted indicates that appellee's position is that the assessments alone created the lien in improvement districts of this nature. We respectfully request the court to consider the statements so quoted in connection with the other statements preceding and following the same, on pages 30 and 31 of appellee's brief. Just preceding the quoted statement will be found the quotation from the Bosworth case explicitly stating that **the "lien of the bonds" upon the lands of the improvement districts is fixed and paramount,** and just following the section quoted by this court will be found the statement that under the statutory provisions in question and court decisions "the bonds in question are liens upon the land in the respective districts." The same thought is incorporated in the conclusion in appellee's brief. See page 69, where these words will be found: "these bonds constituted a first lien, except the lien for general taxes."

We endeavored to carry this thought throughout the entire case. Perhaps in the one instance the writers of appellee's brief inadvertently used the word "assessment" rather than the word "bonds." For these reasons appellee earnestly requests the court to consider appellee's position, as revealed from the entire brief, rather than as is possibly indicated in one paragraph of the brief, dealing only indirectly with the question of whether or not the bonds or the assessment constitutes the lien upon the lands in the district.

When so considered it is felt that the appellee's position and argument are in line with the holding of the Bosworth case to the effect that the bonds of an improvement district, like those under consideration, constitute a lien upon the lands in the district. True, decisions from other states appear to arrive at a somewhat different conclusion than that of the Idaho court in the Bosworth case. This is no doubt attributable to the fact that the statutes upon these questions vary in the different states. At any rate, the highest court of the state of Idaho is conceded the right by the highest tribunals of the land to fix the policies of Idaho and interpret its statutes. Such policies and interpretations, it is respectfully submitted, are binding upon this court.

IF NO LIEN,—BONDS ARE "PROPERTY"

If it be conceded, for the sake of the argument only, that the foregoing position is untenable, then it is respectfully urged that nevertheless the judgment of the district court should be upheld in this case for the reason that

the bonds themselves constitute property that cannot be taken by the government for a public purpose without compensating the bondholders. The term "property" as used in the Fifth Amendment is used in a general sense and embraces every form of property over which man may have exclusive jurisdiction and every form of property which the law recognizes and protects. 12 C. J. 1212; Spring Valley W. Co. v San Francisco, 165 Fed. 667, 676.

As said in the Idaho case of Knowles v New Sweden Irr. Dist., 16 Idaho 217, 231 (101 Pac. 81):

> "Any destruction, interruption or deprivation of the common, usual and ordinary use of property is by the weight of authority a taking of one's property in violation of the constitutional guaranty (citing cases)."

In the rather recent case of Farbwerke, et al, v Chemical Foundation, 39 Fed. (2d) 366, 371, it was held that:

> "* * * a chose in action is property; and an act which takes property from one person and gives it to another * * * without compensation is a deprivation of property without due process of law and is violative of the Fifth Amendment to the Constitution."

This case was affirmed by the United States Supreme Court, 283 U. S. 152. A similar case is that of Fisk v Leith, 299 Pac. (Ore.) 1013.

In the case of State v Greer, 37 A.L.R. 1298, 1304, it was specifically held that municipal bonds constitute property within the meaning of similar constitutional provisions. Under the foregoing authorities it seems certain that the bonds admittedly held and owned by the appellee in this case constitute "property" as that term

is used in the Fifth Amendment. And such is the case whether or not the bonds be considered as constituting a lien upon the lands in the improvement district, or merely choses in action, because the bonds, independent of the lien, are "property" and entitled to the protection of the constitutional guaranty. Regardless of the property classification ascribed to these bonds, the fact remains that they are "property" in a constitutional sense, and therefore cannot be appropriated and confiscated by the government for a public purpose without just compensation being paid to their owners.

We again call the court's attention to the case of United States v Lynah, 188 U. S. 445, because we feel there is a direct and striking similarity between the two cases. In the latter case, in connection with the improvement of navigation in the Savannah River certain dams and obstructions were placed and maintained in the river bed, with the result that the raising of the water above its natural height backed the water against plaintiff's embankment upon the river, interfered with the drainage of his plantation, etc. This was held to be a taking of private property within the meaning of the Fifth Amendment, requiring compensation to be paid by the government, nothwithstanding the work was done by the government in improving the navigation of a navigable river. The raising of the water above its natural level was held to be an invasion of the private property overflowed. On page 468 of the report the court points out that this overflow was to such an extent as to "cause a

total destruction of its value," and thereby the property was "in contemplation of law, taken and appropriated by the government." In a literal sense the land was not taken and carried away; the land remained where it had been, but it was made into an irreclaimable bog, unfit for any purpose and deprived of all value. After a thorough discussion of the authorities and the subject the court stated:

> "While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee; * * ." (p. 470).

The only difference between the Lynah case and the immediate case, having in mind the above concession which was made for the sake of the argument (namely, that if there is no lien, yet the bonds constitute property), is that the property taken and appropriated and destroyed in the Lynah case was farm land, while the property similarly taken, appropriated, and destroyed in the immediate case was in the form of municipal bonds. These bonds are just as thoroughly and completely "bogged" and rendered valueless as the claimant's lands were in the Lynah case. The latter case has been quoted and recognized as authority upon the subject by innumerable decisions, and it is confidently urged that the same constitutes sufficient authority for appellee's position upon this point.

In this case it must be remembered, as this court observed on pages 4 and 16 of its opinion, that neither the individual property owner nor the improvement district itself nor the village is personally liable. "There is no personal obligation." The only method of collecting these bonds has been appropriated and taken by the government, and thereby the government has taken and appropriated the property itself. Bonds which were a few months ago valuable, enforceable property now are a mere shadow and as worthless as if the government's officials had actually burned them to ashes, or the reservoir waters had literally and physically buried and "bogged" them forever. There can be no more complete confiscation and taking than that shown in this case.

The court intimates that there is a distinction between the modification of the remedy by government action and destruction of the right. That may be true in cases where the remedy is not unreasonably modified, that is, not so modified as to constitute in reality destruction or taking of the right. As stated in the case of People v La Fetra, 16 A.L.R. 152, 158:

> " * * * any law which in its operation amounts to a denial or obstruction of rights accruing by contract, though professing to act only on the remedy, is directly obnoxious to the prohibitions of the Constitution."

In the latter case writ of error was dismissed by the U. S. Supreme Court, 257 U. S. 665. The Supreme Court of Idaho thus expresses the rule, in the case of Fidelity State Bk. v North Fork H. Dist., 35 Idaho 797, 209 Pac. 448, 31 A.L.R. 781:

> "While the remedy may be modified at the discretion of the legislative body, it cannot be taken away, for the right to property necessarily implies a right to process of law to protect it. The remedy to enforce a contract is a part of the contract, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void. (Edwards v Kearzey, 96 U. S. 595, 24 L. ed. 793.)" (p. 811 Idaho report)

The U. S. Supreme Court made substantially the same holding in the case of Barnitz v Beverly, 163 U. S. 118.

Some of the decisions, notably that of Omnia Comm. Co. v United States, 261 U. S. 502, make an apparently narrow and fine distinction between the terms "taking," "destruction," and "injury." However, when the latter case is studied, it will be observed that there was no confiscation or taking of the "obligation or the right to enforce it." As pointed out in the case of International Paper Co. v United States, 282 U. S. 399, 408, the action of the United States made it "practically impossible" for the company to keep its contract. However, in the Omnia case there was no taking or acquisition of the right to enforce the contract, as pointed out by the Supreme Court in its own opinion. In the immediate case there has been an absolute and permanent taking of the right to enforce the obligation of the bonds, and thereby the bonds have been for all legal and equitable purposes taken and appropriated forever. The destruction and taking in the immediate case is far more thorough and permanent than the taking of the claimant's land in the Lynah case. The bonds now remain in the possession

of the appellee, but the action of the government has taken away every penny of value that was attached to the bonds before the action of the government.

Most of the foregoing cases deal with the constitutional provision prohibiting the impairment of the obligation of contracts, while the immediate controversy involves the Fifth Amendment. The situations are analogous and the same reasoning should apply.

STATUTES OF LIMITATIONS

In the latter part of the court's opinion it is stated that the suit is too late. We respectfully submit that the court has not correctly analyzed appellee's position upon this phase of the case. The appellant has consistently argued, in line with this court's holding, that any action which the appellee might have had accrued when the government acquired the property from the individual owners. In other words, that the date of the contracts of purchase, or deeds, from the individual owners to the government started the statutes of limitations running. Appellee's answer to this position is twofold.

In the first place, as pointed out on pages 15 to 17 of appellee's brief in this court, the statute of limitations is an affirmative defense. Not only must the one relying thereon affirmatively plead it, but the burden also rests upon him to affirmatively establish it by competent evidence. The record shows that the government has pleaded the statutes of limitations in this respect, but certainly no proof has been submitted showing the date of these contracts and deeds, with only two exceptions.

Mr. Banks, the government engineer, testified that he took possession of the first piece of land,

> "in 1920 or early in the spring of 1921 and the balance of the lots required for reservoir site were required by the defendant the United States by purchase and condemnation between that time and the year 1926 * * *." (R. 131)

See also defendant's exhibit 1, which is the land purchase contract between Dahlen and the government for a specific lot. This contract was dated December 9, 1925. To summarize, the record shows that one lot was acquired in 1920 or 1921 and another was acquired December 9, 1925. Positively and emphatically there is no showing as to the date when any other lot, of the many buried beneath the reservoir and formerly part of the American Falls townsite, was acquired by the government. In view of the record and under the authorities cited on pages 16 and 17 of appellee's brief in this court, the government has not produced evidence upon which the plea of the statute of limitations can be upheld, even under the theory that the statute began to run when the property was acquired by the government from the individual owners.

In the second place, appellee answers this proposition as to the statute of limitations by reiterating its theory and agrument that the statute of limitations did not begin to run when the contracts and deeds were executed, for the reason that these contracts and deeds did not amount to the acquisition by the government of the full fee and title of the property. Explicitly and clearly the con-

tracts under which the government acquired the land recognized that there were or may be liens or encumbrances against the property and provided that the government might withhold sufficient sums to pay such liens or encumbrances as might exist. See paragraph 7 of defendant's exhibit 1. This is tantamount to the government's acquiring the property subject to the lien of appellee's bonds. Patently the government did not thereby take appellee's bonds or its lien or its property, it merely acquired the individual owners' property rights in the land, leaving the lien or right of appellee and of other lien holders or encumbrancers intact and to be paid in regular course. It is appellee's position that the statute of limitations did not begin to run until the government repudiated its implied promise to take care of and pay the liens and encumbrances against the land, including appellee's bonds. We use the expression "the government's implied promise to pay appellee" advisedly, because the record abundantly shows, and admittedly shows, that the government officials in charge of the construction of the reservoir had complete and thorough notice of the outstanding bonds owned by appellee; more than this, for a time these officials withheld money from the individual owners to take care of these bonds, until some $13,000 or $14,000 were in a fund for such purpose, and then sometime in 1929, for what reason the record does not show, the government officials determined that they would not pay appellee's bonds, and thereby repudiated their promise so to do. The appellee's right of

action could not arise so long as its property remained unappropriated. Appellee's property, whether its property be considered as bonds secured by lien upon the property within the districts, or merely as unsecured bonds, or choses in action, was not appropriated as long as the government was acquiring the land, subject to "liens or encumbrances existing against said property" (Deft's Ex. 1, par. 7), and promising and arranging to pay appellee. When the land was flooded by the waters of the reservoir, appellee's property was taken, confiscated, and destroyed permanently and absolutely. Then appellee's right of action arose. The suits were not filed at that time because the government officials were promising to pay appellee and were withholding funds for that purpose. However, in 1929, this arrangement was repudiated by the government officials and thereupon the immediate action was filed. This action was within the period of the statute of limitations as fixed by the Tucker Act, since it was within six years of the date of the "taking" of appellee's property for a public purpose.

For the foregoing reasons it is earnestly and respectfully urged that this court grant a rehearing in this case, and upon such rehearing affirm the judgment appealed from.

BISSELL & BIRD
Attorneys for Appellee.

No. 6872

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDGAR D. ROSENBERG, HELEN ROSENBERG KAHN, and CLAUDE N. ROSENBERG,

Appellants,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue for the First District of California,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

FILED
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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

ADOLPHUS E. GRAUPNER, Esq., 1120 Balfour Bldg., San Francisco, Calif.,

Attorney for Appellants.

GEO. J. HATFIELD, U. S. Attorney, ESTHER B. PHILLIPS, Asst. U. S. Attorney, Post Office Bldg., 7th & Mission Sts., San Francisco, Calif.,

Attorneys for Appellee.

In the United States District Court for the Northern District of California, Southern Division.

No. 2998–S.

EDGAR D. ROSENBERG, HELEN ROSENBERG KAHN and CLAUDE N. ROSENBERG,

Plaintiffs,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue of the United States for the First District of the State of California,

Defendant.

BILL IN EQUITY FOR INJUNCTION.

Now come the plaintiffs above named and for cause of action against the above-named defendant allege:

I.

Each and all of the plaintiffs above named are citizens of the United States and of the State of California and reside in the City and County of San Francisco, State of California.

II.

The defendant, John P. McLaughlin, is now, and during all the times hereinafter mentioned was, Collector of Internal Revenue of the United States of America for the First District of California, duly qualified and acting as such.

III.

The matter or amount in controversy herein exceeds, exclusive of interest and costs, the value or sum of three thousand dollars.

IV.

On May 31, 1923, Isidore Rosenberg died testate and a [1*] resident of the City and County of San Francisco aforesaid, leaving him surviving his widow Natalie Rosenberg and three children, Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg, the plaintiffs herein. Thereafter, and on June 20, 1923, the last will and testament of said decedent was duly admitted to probate and said Natalie Rosenberg appointed executrix thereof by order of the Superior Court of the State of California, in and for the City and County of San Francisco, and thereupon she qualified and entered upon her duties as such executrix.

*Page-number appearing at the foot of page of original certified Transcript of Record.

Among other provisions, said last will and testament of said Isidore Rosenberg, deceased, gave, devised and bequeathed his entire estate to his said widow and children in the proportions set opposite their respective names, as follows:

Natalie Rosenberg, widow................one-half
Helen Rosenberg Kahn, daughter........one-sixth
Edgar D. Rosenberg, son.................one-sixth
Claude N. Rosenberg, son................one-sixth

V.

On December 21, 1923, and within one year after the death of said decedent, Natalie Rosenberg, as said executrix, pursuant to the provisions of Title IV of the Revenue Act of 1921 and in good faith, made and filed with defendant, as such Collector of Internal Revenue, a return under oath in duplicate setting forth the value of the gross estate of decedent at the time of his death, the deductions allowable under section 403 of said Revenue Act of 1921, the value of the net estate of said decedent as defined in said section 403 and the estate tax payable thereon as computed by her in the amount of $7,791.04. At the time of filing said return for estate tax and prior to the due date of said tax, said executrix fully paid the amount of the estate tax shown upon said return by paying to defendant, as such Collector, said amount of [2] $7,791.04.

VI.

Thereafter, on March 24, 1924, and prior to the distribution of the estate of said decedent as hereinafter alleged, said Natalie Rosenberg, as such ex-

ecutrix, filed with defendant, as such Collector, and with the Commissioner of Internal Revenue her claim as such executrix for refund in the amount of $5,181.90 of the estate tax paid by her as aforesaid on the ground that the same had been illegally collected by defendant, as such Collector.

VII.

On May 17, 1924, and prior to any action by said Commissioner on the refund claim filed as hereinabove in paragraph VI alleged, said executrix rendered and filed with the Superior Court of the State of California, in and for the City and County of San Francisco, her first and final account and report of her administration of the estate of said decedent, together with her petition for the settlement of said account and the distribution of said estate.

VIII.

On July 10, 1924, said first and final account of said executrix and her petition for final distribution of said estate came on for hearing before the said Superior Court and thereupon said court made and entered its decree settling said first and final account of said executrix and ordering the distribution of said estate to the beneficiaries hereinabove in paragraph IV named and in the proportions set opposite their respective names in said paragraph.

IX.

By and under said decree of distribution the entire estate of said decedent was distributed to the

above-named heirs and beneficiaries under the will of said decedent in the aforesaid proportions. Among the properties distributed in said decree, [3] there was distributed an undivided three-eighths interest in and to all that certain lot, piece or parcel of land situate, lying and being in the City and County of San Francisco aforesaid and bounded and particularly described as follows, to wit:

> Beginning at a point on the westerly line of Powell Street distant thereon ninety-one (91) feet and three (3) inches northerly from the point formed by the intersection of the westerly line of Powell Street with the northerly line of Post Street, and running thence northerly along said line of Powell Street forty-six (46) feet and one (1) inch thence at a right angle westerly eighty (80) feet; thence at a right angle southerly forty-six (46) feet and one (1) inch; thence at a right angle easterly (80) feet to the point of beginning. Being a part of 50 Vara Lot No. 586.
>
> Together with the improvements thereon and subject to a bank mortgage on the entire property in the amount of $160,000.

Under said decree of distribution and on said July 10, 1924, the undivided three-eighths interest in and to the above-described real property passed from the gross estate or any other estate of said decedent into the ownership and possession of the

heirs and legatees of said decedent in the following undivided portions:

Natalie Rosenberg, widow........three sixteenths
Edgar D. Rosenberg, son.............one sixteenth
Helen Rosenberg Kahn, daughter....one sixteenth
Claude N. Rosenberg, son............one sixteenth

At the date of death of said Isidore Rosenberg and at the time of the distribution of his estate as aforesaid, Joseph Cahen owned an undivided one-half interest and said Edgar D. Rosenberg owned an undivided one-eighth interest in the above-described parcel of real property.

X.

At the time of the distribution of the estate of said Isidore Rosenberg, deceased, as aforesaid, all estate taxes shown upon the return filed by said executrix had been paid to defendant, [4] as such Collector, and no additional amount of tax on said estate had been determined, found to be due, assessed, or demanded by the Commissioner of Internal Revenue or by defendant, as such Collector.

XI.

On February 7, 1925, said Natalie Rosenberg died testate at the City and County of San Francisco aforesaid. Thereafter and on March 9, 1925, her last will and testament was admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco, and Helen Rosenberg Kahn was thereupon and by order of said court appointed executrix of said last will and testament and immediately thereafter duly qualified as and became the executrix of said estate.

In and by said last will and testament, after providing for certain specific legacies, said Natalie Rosenberg, deceased, designated her three children Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg, the plaintiffs herein, as residuary legatees of her estate to take the residue thereof share and share alike.

On July 10, 1925, said Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg filed a petition for partial distribution of the said estate of Natalie Rosenberg with the Superior Court aforesaid and therein prayed for distribution to them share and share alike of the three-fifths interest of the said estate in the parcel of real property hereinbefore described. On July 27, 1925, said Superior Court made and entered its decree of partial distribution whereby and whereunder the interest of said estate in and to said described property was distributed to said residuary legatees in the proportions of one-sixteenth undivided interest to each.

On or about February 6, 1926, as required by the Revenue Act of 1924, said Helen Rosenberg Kahn, as such executrix, [5] made and filed a return for estate tax for said estate of Natalie Rosenberg, deceased, with said defendant, as such Collector, and at said time paid the amount of estate tax shown upon said return to defendant, as such Collector.

On June 23, 1926, by regular proceedings had, the estate of said Natalie Rosenberg, deceased, was, by order and decree of the aforesaid Superior Court, finally distributed.

XII.

After the death of said Natalie Rosenberg and on March 23, 1925, said Edgar D. Rosenberg filed with the Superior Court of the State of California, in and for the City and County of San Francisco, his petition for appointment as administrator with the will annexed of the estate of said Isidore Rosenberg, deceased, thereafter, and on April 6, 1925, said Superior Court made its order appointing said Edgar D. Rosenberg the administrator with the will annexed of said estate and on said date said Edgar D. Rosenberg qualified as such administrator and ever since has been and now is the duly qualified and acting administrator with the will annexed of the estate of said Isidore Rosenberg, deceased. Said letters of administration were obtained solely for the purpose of collecting and receiving a refund in estate tax for said estate.

XIII.

On April 22, 1925, the Commissioner of Internal Revenue, by letter addressed to "Natalie Rosenberg, Executrix, Estate of Isidore Rosenberg," advised in his action on the claim for refund filed by said executrix, as hereinbefore in paragraph VI alleged, as follows:

"Madam:

"The Bureau has examined the claim filed by you as executrix on behalf of the above-named estate for refund of $5,181.90 paid under the Revenue Act of 1921. [6]

"The protest is based upon the inclusion in the

gross estate of the value of the widow's interest in community property.

"A final audit of the return for the estate discloses an excess payment of $4,787.60 as follows:

"Tax paid on basis of the return.........$7,791.04
Tax determined on audit of return...... 3,003.44

Excess payment.........................$4,787.60

* * * * * * * * * *

"In view of the foregoing, your claim for refund of $5,181.90 will be certified to the Disbursing Clerk of the Treasury Department for payment in the sum of $4,787.60 and is rejected as to $394.30."

XIV.

Thereafter and on or about June 5, 1925, defendant, as such Collector, paid and refunded to said Edgar D. Rosenberg, as such administrator with the will annexed of the said estate of Isidore Rosenberg, deceased, the aforesaid amount of $4,787.60, which said amount was thereupon and immediately distributed to plaintiffs, and, since said time, said estate has been without property or assets of any kind whatsoever.

XV.

On June 1, 1925, and prior to the determination or assessment of any additional tax against said estate of Isidore Rosenberg, deceased, plaintiffs purchased an undivided one-half interest in and to the real property hereinabove in paragraph IX described from Joseph Cahen, who had owned the said one-half interest since prior to the death of said Isidore Resenberg. On the same date plaintiffs sold

an undivided one-quarter interest in and to said real property to Irving D. Langendorff, who ever since has been and is the owner of such one-quarter interest. On said June 1, 1925, plaintiffs and said Langendorff entered into, and have ever since maintained and now maintain, an agreement of partnership for the operation of said property and the building thereon as a hotel, and have been and now are the owners and in possession of [7] said property in copartnership.

XVI.

Thereafter and on September 25, 1926 (more than three years and three months after the death of said Isidore Rosenberg and more than two years and two months after the estate of said deceased had been finally distributed), the Commissioner of Internal Revenue reaudited the estate tax return filed as hereinafter alleged in paragraph V and made a redetermination of the estate tax for said estate, as follows:

Tax redetermined		$10,842.51
Tax paid on filing return	$7,791.04	
Tax refunded	4,787.60	
Tax discharged		3,003.44
Deficiency in tax due		$ 7,839.07

Of the deficiency so alleged and determined the amount of $3,051.47 constituted an additional tax or deficiency in tax while the amount of $4,787.60 constituted an alleged erroneous refund to said estate.

XVII.

On September 25, 1926, said Commissioner caused to be issued and mailed to Edgar D. Rosenberg, as administrator with the will annexed of the estate of Isidore Rosenberg, deceased, a notice of deficiency. On October 19, 1926, and within sixty days after the mailing of said notice of deficiency as aforesaid, said Edgar D. Rosenberg, as such administrator, filed a petition (Docket No. 20,668) with the United States Board of Tax Appeals for a redetermination of said alleged deficiency as provided in Section 308 (a) of the Revenue Act of 1926. On December 28, 1928, said petition came on for hearing before said Board and on January 16, 1929, said Board made and entered its final decision in favor of said Commissioner for said amount of $7,839.07.

XVIII.

On February 27, 1929, said Edgar D. Rosenberg, as such [8] administrator, paid from his personal funds, defendant, as such Collector, the deficiency in tax in the amount of $3,051.47, as hereinbefore in paragraph XVI alleged, together with interest thereon at six per centum per annum from May 31, 1923, in the amount of $868.77, or a total sum of $3,920.24.

XIX.

Thereafter on July 27, 1929, said Collector of Internal Revenue assessed an alleged additional estate tax or deficiency in estate tax against said estate of Isidore Rosenberg, deceased, in the amount of $7,839.07 and placed the same on the July as-

sessment list for Miscellaneous Taxes—estate, at page 308, line 4.

On August 15, 1929, and again on March 19, 1930, defendant, as such Collector, mailed notice and demand for payment of an alleged balance of deficiency in estate tax for said estate, in the amount of $4,787.60, with interest thereon at six per centum from May 31, 1924, to said Edgar D. Rosenberg, as administrator with the will annexed of the said estate of Isidore Rosenberg, deceased.

XX.

On said August 15, 1929, when defendant, as such Collector, mailed his first notice and demand for payment of the said alleged additional amount of estate tax, there was no existing gross or other estate of said Isidore Rosenberg, deceased, in the control or possession of said Edgar D. Rosenberg, as such administrator or otherwise, or in the possession or control of any other person as administrator or executor of said estate, from which said additional estate tax or any other tax could be paid.

XXI.

On April 30, 1930, defendant, as such Collector of Internal Revenue, issued an alleged warrant of distraint against said Edgar D. Rosenberg, as such administrator with the will annexed, [9] for Miscellaneous Taxes—estate, but has never issued any warrant of distraint against plaintiffs, or any of them.

XXII.

Thereafter and on May 12, 1930, defendant, as

such Collector, caused to be mailed to said Edgar D. Rosenberg, as such administrator with the will annexed, a notice advising him that a distraint warrant had been issued against him for failure to pay "INCOME TAX FOR THE YEAR 1929 LIST," which said notice was in the words and figures following, to wit:

TREASURY DEPARTMENT,
Internal Revenue Service,
San Francisco, Calif.

May 12th, 1930.

Estate of Isador Rosenberg,
Edgar Rosenberg Administrator,
Chancellor Hotel.

Kindly call at Room 503 Custom House, on May 14th, between the hours of 6:30 and 9:30 a. m.

You are advised that a warrant has been issued against you for having failed to pay your Income Tax for the year 1929 List, after having received previous notice to do so.

Should you desire to clear this matter up, mail a check or Post Office Money Order, payable to the Collector of Internal Revenue, for $6,935.31 atten-

tion of the undersigned.

For your information I quote Section 253 of the Revenue Act of 1921, which reads as follows:

"That any individual, corporation or partnership required under this title to pay or collect any tax, to make a return or to supply information, who fails to pay or collect such

tax, to make such a return, or to supply such information, at the time or times required under this title shall be liable to a penalty of not more than $1,000. Any individual, corporation, or partnership who wilfully refuses to pay or collect such tax, to make such statement or to supply such information at the time or times required under this title or who wilfully attempts in any manner to defeat or evade the tax imposed by this title, shall [10] be guilty of a misdemeanor and shall be fined, not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution."

You will appreciate from the foregoing the necessity of prompt compliance to this FINAL 4th notice.

Respectfully,

S. A. BYRNE,
Deputy Collector.

XXIII.

On June 19, 1930, said Edgar D. Rosenberg, on behalf of himself as such administrator and as an individual and also on behalf of the plaintiffs herein, caused a letter and protest to be mailed to said Commissioner and a copy thereof to defendant, as such Collector, wherein and whereby notice was given that the estate of Isidore Rosenberg, deceased, had been distributed by order of court prior to the determination of any alleged deficiency in tax. Said letter advised said Commissioner and

defendant that said estate was without assets and protested that proceedings under section 316 of the Revenue Act of 1926, against the distributees of the estate of said Isidore Rosenberg, deceased, as transferees, had not been instituted. Said letter further advised said Commissioner and defendant that no assessment of any liability for tax incident to the estate of Isidore Rosenberg, deceased, had been made against the distributees thereof, plaintiffs herein.

XXIV.

On July 25, 1930, said Commissioner, by letter bearing that date, informed said Edgar D. Rosenberg, as such administrator, that the Collector, defendant herein, was "being instructed to proceed with the collection of the amount due from the estate," which letter was received by said Edgar D. Rosenberg on or about July 30, 1930.

On July 30, 1930, said Edgar D. Rosenberg caused another [11] letter and protest to be addressed and mailed to said Commissioner, and a copy thereof mailed to defendant, wherein he again called attention to the fact that the said estate of Isidore Rosenberg was without assets and contended that the distributees of said estate were entitled to assessment against them and that a notice of liability should be sent to each of them as transferees before the Commissioner could proceed to collect.

The Commissioner of Internal Revenue replied to said letter and protest on August 5, 1930, advising said Edgar D. Rosenberg, as such administrator, that transferee proceedings were not neces-

sary "for the continuance, validity or enforcement" of the lien which he asserted arose against said estate under the provisions of section 409 of the Revenue Act of 1921. Said letter was received by said Edgar D. Rosenberg on or about August 10, 1930.

On August 16, 1930, plaintiffs caused a reply to said letter to be mailed to the Commissioner in which the attention of the Commissioner was again called to the distribution of the estate of Isidore Rosenberg, deceased, and request was made that transferee proceedings be initiated against the distributees of said estate in order that they might assert their defenses to the alleged deficiency in tax.

On August 30, 1930, said Commissioner replied to the aforesaid letter of August 16, 1930, and declined to initiate transferee proceedings against the distributees of said estate of Isidore Rosenberg, deceased, who are the plaintiffs herein.

XXV.

On January 28, 1931, defendant, as such Collector and acting under instructions of said Commissioner, caused a letter or notice to be addressed and delivered to each of the plaintiffs herein in identical language, except as to the name, the address of the party and the interest in the property, which said notice was in the [12] *the* words and figures following, viz.:

TREASURY DEPARTMENT,
Internal Revenue Service,
San Francisco, Calif.
January 28, 1931.

Office of the Collector,
First District of California.
In replying refer to
Field Division—P.B.S.

Mr. Edgar Rosenberg,
Chancellor Hotel,
433 Powell St.,
San Francisco, California.

Sir:—

By virtue of a warrant for distraint placed in my hands for service by the Collector of Internal Revenue for the First District of California, and which was issued for unpaid income taxes amounting to $4,787.60 together with interest thereon which has been assessed against the Estate of Isidore Rosenberg, San Francisco, California, and of which you are one of the heirs, I have levied upon the following described property of which you have an undivided sixteen forty-eighths interest:—

Commencing at a point on the westerly line of Powell Street distant thereon ninety-one (91) feet three (3) inches northerly from the point formed by the intersection of the said westerly line of Powell Street with the northerly line of Post Street, running thence northerly along the said westerly line of Powell

Street forty-six (46) feet one (1) inch, thence at a right angle westerly eighty (80) feet, thence at a right angle southerly forty-six (46) feet one (1) inch and thence at a right angle easterly eighty (80) feet to the westerly line of Powell Street and the point of commencement. Being a portion of 50 Vara Lot Number 586.

Under the provisions of Section 3190, Revised Statutes of the United States, the above property will be duly advertised in the "Daily Commercial News" and sale of the above will be made on the steps of the CUSTOM HOUSE, Battery & Washington Sts. on February 26th, 1931, at 10 o'clock A. M.

Respectfully,

S:W. P. S. HIGGINS,

Chief Field Deputy Collector. [13]

Each of the plaintiffs herein received a copy of the foregoing letter or notice on January 29, 1931. On said date no assessment of liability for any taxes alleged to be payable from said estate of Isidore Rosenberg, deceased, nor any notice or demand for payment thereof, had been made against plaintiffs or any of them by said Commissioner of Internal Revenue or by said defendant, as such Collector.

XXVI.

The parcel of real property described in the notice of levy and intention to sell hereinabove quoted is the same parcel of real property hereinabove in paragraph IX described.

XXVII.

On or about February 16, 1931, defendant, as such Collector, postponed the sale of plaintiff's interest in said property under distraint proceedings and thereafter set aside and vacated the notices served on plaintiffs and each of them as hereinbefore in paragraph XXV alleged. However, defendant informed plaintiffs' attorney that he would proceed to distrain for said alleged estate tax under instruction of the Commissioner.

XXVIII.

On May 21, 1931, plaintiffs addressed and mailed a letter and protest to defendant, as such Collector, wherein they called his attention to the facts of the case and the refusal of said Commissioner to proceed against them as transferees. Plaintiffs are informed and believe, and for that reason allege, that defendant transmitted a copy of said letter to said Commissioner and that on or about June 23, 1931, defendant received a letter from said Commissioner relating to plaintiff's aforesaid letter of May 21, 1931. On June 24, 1931, defendant, by letter informed plaintiffs that said Commissioner had ordered him "to proceed by distraint."

XXIX.

On June 25, 1931, plaintiffs addressed and mailed a [14] letter and protest to said Commissioner as follows:

June 25th, 1931.

Commissioner of Internal Revenue,
Constitution Ave., Between Tenth & Twelfth Sts., N. W.
Washington, D. C.

In re: Estate of Isidore Rosenberg, Deceased.
A&C:Col:O.

Dear Sir:

My sister, Helen Rosenberg Kahn, my brother, Edgar D. Rosenberg, and I, distributees of the estate of Isidore Rosenberg, deceased, have been informed by the Collector of Internal Revenue that he has been ordered to proceed by distraint against property belonging to us to collect an alleged deficiency in tax asserted by you against said estate.

The three of us desire to protest this arbitrary and illegal order and again to call to your attention the fact that, in seeking to collect said alleged deficiency in tax, you are proceeding in violation of the Revenue Acts involved in two respects: (1) You are asserting a lien against the property distributed to us from said estate on the assumption that section 409 of the Revenue Act of 1921 creates such a lien and (2) You are refusing to proceed against us as transferees of said estate as required by section 316 of the Revenue Act of 1926.

Section 409 of the Revenue Act of 1921 is not authority for the assertion of a lien by you under the facts involved in this matter. Section 316 of the Revenue Act of 1926 provides the only method for you to proceed against us for the assessment

and collection of the alleged tax liability due from said estate.

Will you please advise me of your intended action in this matter.

Very truly yours,

(Signed) CLAUDE N. ROSENBERG,

For Himself and Helen Rosenberg Kahn and Edgar D. Rosenberg.

A copy of the foregoing letter and protest was on said date mailed to defendant.

XXX.

On July 6, 1931, said Commissioner addressed and mailed a letter to said Claude N. Rosenberg, one of the plaintiffs [15] herein, in reply to the letter hereinabove in paragraph XXIX set forth, as follows:

July 6, 1931.

A&C:Col:O.

Mr. Claude I. Rosenberg,
c/o Bacigalupi, Elkus & Salinger,
485 California Street,
San Francisco, California.

Sir:

Receipt is acknowledged of your communication dated June 25th regarding the collection of taxes assessed against the Estate of Isidore Rosenberg. You request to be advised as to what action the Bureau intends to take in connection with this matter.

In reply, you are informed that the Collector has been advised that the tax in question is collectible by process of distraint. It is suggested you

get in touch with the Collector of Internal Revenue at San Francisco with a view to satisfying the liability.

Respectfully,
(Signed) GEO. J. SCHOENEMAR,
Deputy Commissioner.

NrVa.

XXXI.

On August 17, 1931, defendant, as such Collector, caused a letter or notice to be addressed and delivered to each of said plaintiffs, which said letters and notices were in identical language, except as to the name, the address of the party and the interest in the property described, and were in the words and figures following, viz.:

TREASURY DEPARTMENT,
Internal Revenue Service.

San Francisco, Calif.,
August 17, 1931.

Office of the Collector,
First District of California.
In replying refer to
Field Division—P. S. R.
Mr. Claude Rosenberg,
c/o Sidney Kahn Co.
Pacific Bldg.
San Francisco, California.

Sir:—

By virtue of a warrant for distraint [16] placed in my hands for service by the Collector of Internal Revenue for the First District of Cali-

fornia, and which was issued for unpaid estate taxed amounting to $4,787.60 together with interest thereon which has been assessed against the Estate of Isidore Rosenberg, San Francisco, California, and of which you are one of the heirs, I have levied upon the following described property of which you have an undivided ten-forty-eighth interest:—

> COMMENCING at a point on the westerly line of Powell Street distant thereon ninety-one (91) feet three (3) inches northerly from the point formed by the intersection of the said westerly line of Powell Street with the northerly line of Post Street, running thence northerly along the said westerly line of Powell Street forty-six (46) feet one (1) inch, thence at a right angle westerly eighty (80) feet, thence at a right angle southerly forty-six (46) feet one (1) inch and thence at a right angle easterly eighty (80) feet to the westerly line of Powell Street and the point of commencement. Being a portion of 50 Vara Lot Number 586.

Under the provisions of Section 3190, Revised Statutes of the United States, the above property will be duly advertised in the "daily Commercial News" and sale of the above will be made on the steps of the CUSTOM HOUSE, Battery & Washington Sts. on September 1, 1931, at 10 o'clock A. M.

Respectfully,

BURNETT SHEEHAN,

Deputy Collector.

S:W.

The defendant served no notice of any nature whatsoever on said administrator of the estate of Isidore Rosenberg, deceased, at said time or at any time subsequent to May 12, 1930, as alleged in paragraph XXII hereinabove, relating to said distraint proceedings or to the collection of any tax. The property described in said notice is the same as that hereinabove described in paragraph IX and XXV. [17]

XXXII.

Defendant, as such Collector of Internal Revenue, has threatened to, now threatens to, and will, unless restrained by order of this court, levy upon, seize and sell the interests of plaintiffs and each of them in the real property hereinabove described on September 1, 1931, under the alleged warrant of distraint hereinabove in paragraph XXI mentioned for the purpose of enforcing the collection of the amount of $4,787.60 alleged estate tax together with interest asserted to be due thereon in excess of $2,513.47, which said defendant asserts to be due from said estate of Isidore Rosenberg, deceased.

XXXIII.

That the amount of $4,787.60, which defendant asserts to be a deficiency in estate tax, is the amount of an alleged erroneous refund. That the interest sought to be collected by defendant as aforesaid, computed on the basis used by defendant as being in excess of $2,513.47, is erroneously and illegally claimed, in that no statutory or other legal provision permits charging or collecting interest on

erroneous refunds from the date the estate tax became due or from any other date.

XXXIV.

The asserted tax which defendant seeks to collect by distraint is $4,787.60 and the asserted amount of interest thereon is not less than $2,513.48, or a total of not less than $7,301.08, and, if paid by plaintiffs to prevent the sale of said property, will be lost to them, their right thereto utterly destroyed for want of remedy at law, and plaintiffs will suffer irreparable damage in that amount.

XXXV.

Because the property proposed to be sold is held in undivided interests and is maintained and operated under partnership [18] agreement as hereinbefore in paragraph XV alleged, and, also, due to present conditions in values, particularly in real estate values, said property could be sold only at great sacrifice or at an extraordinarily low price and plaintiffs would suffer irreparable injury and damage. The proposed sale of said property under distraint proceedings would terminate and cause the liquidation of said partnership and cause damage to plaintiffs far in excess of the amount of said alleged deficiency in tax, with interest, and beyond any amount which might be recovered in any action for damages against defendant by plaintiffs or the United States after said sale was made, if any such right of action would exist.

XXXVI.

The position of the Commissioner of Internal

Revenue and the defendant as above alleged and the threatened action of defendant as hereinbefore stated are violative of plaintiffs' rights under the Fifth Amendment to the Constitution of the United States in that defendant, acting under the direction of said Commissioner, seeks to deprive plaintiffs of their property without due process of law.

XXXVII.

By reason of the facts hereinabove alleged, plaintiffs have and each of them has, no speedy, plain, adequate, or complete remedy at law, or any remedy at law, and plaintiffs are, and each of them is, deprived of all equitable and legal defenses and rights as transferees, if such they be, and will suffer immediate and irreparable injury, loss and damage in event that collection and payment of said amount of $4,787.60, or any part thereof, together with interest thereon is enforced by the sale under distraint proceedings threatened and hereinabove complained of.

XXXVIII.

The facts and circumstances involved in this proceeding are exceptional and extraordinary, and are such as to entitle plaintiffs [19] to relief in equity, in the following and each of the following particulars, viz.:

1. The alleged lien under which defendant, as such Collector, seeks to proceed is illegal and void, and without warrant in law;

2. The warrant of distraint heretofore in paragraph XXI alleged was issued without warrant of

law and in violation of the Fifth Amendment of the United States Constitution, and is illegal and void as to plaintiffs herein and each of them;

3. Defendant and said Commissioner are without power to assess a deficiency against plaintiffs, or proceed by distraint proceedings to collect from plaintiffs, and alleged liability for taxes of said estate of Isidore Rosenberg, deceased, by the provisions of sections 316 and 308 (a) of the Revenue Act of 1926;

4. Plaintiffs herein as distributees of the estate of Isidore Rosenberg, deceased, are without remedy at law either to prevent defendant, as such Collector, from selling under said distraint warrant their respective interests in and to the above described real property or to obtain refund of the amount of said alleged tax and interest, if paid by them, in that, if they paid said alleged tax and interest, they are expressly prohibited by statute from making any claim for refund of any amount paid by them in satisfaction of said alleged tax or bringing action in any court for any part of such tax or interest which they might pay;

5. Said Commissioner has failed and refused to proceed to assess against or collect from plaintiffs or any of them their liability, if any, as the distributees of said estate "in the same manner and subject to the same provisions and limitations as in the case of a deficiency" in estate tax and has thereby deprived plaintiffs, and each of them, of the right to defend against any liability which might be asserted against them, or any of them,

as transferees or to pay any alleged liability as transferees and seek to recover the same [20] on claim or in action for refund thereof;

6. Said Commissioner has refused to assert or determine a liability at law or in equity, or proceed against plaintiffs, or any of them, as transferees of said estate of Isidore Rosenberg, deceased, for any alleged estate tax against said estate as required of him by law;

7. Said Commissioner has failed and neglected to bring any action at law or in equity to attempt to recover from said plaintiffs or any of them the estate tax alleged to be due from said estate and thus permit them to defend against any liability for said alleged tax;

8. The only remedies at law which remained available to plaintiffs, or any of them, after defendant, as such Collector, issued his warrant of distraint as aforesaid was that of protest to said defendant and Commissioner against procedure under said warrant of distraint and make demand on said Commissioner to proceed against plaintiffs as transferees of the said estate of Isidore Rosenberg, deceased. Plaintiffs made such protest and demand as aforesaid and were denied any relief by said Commissioner, or by defendant; that plaintiffs and each of them have thus exhausted the only remedies now open to or afforded them by law;

9. Only said Commissioner may initiate steps to create said plaintiffs transferees, or confer upon them the right to defend themselves as transferees, whereupon and whereunder plaintiffs, or any of

them, may avail themselves of a defense against said asserted tax liability, or a transferee liability, or a right of claim for refund or action therefor, and this said Commissioner has failed and refused to do;

10. Irreparable and irrecoverable damages will result to plaintiffs and each of them if defendant, as such Collector, is permitted to proceed with distraint proceedings now threatened and hereinabove alleged;

11. Defendant, as such Collector, is seeking by warrant of distraint to seize and sell property of persons other than the taxpayer on [21] which the Federal Government has no present legal lien or claim of lien and under circumstances which, if plaintiffs pay the alleged tax they will have no remedy at law under the Federal statutes to sue and recover the money paid;

12. Plaintiffs herein are not taxpayers against whom the alleged tax was so assessed and levied, nor have they been recognized by said Commissioner or defendant as transferees within the meaning of that word as used in the Revenue Act of 1926, nor have they any status under said Revenue Act or the Revenue Act of 1928 which subjects them to liability for tax, lien, or distraint;

13. Said amount of $4,787.60 sought to be collected by distraint proceeding as hereinabove alleged is the amount of an alleged erroneous refund and, as such, there is not and cannot be any lien therefor against the property of the said estate of Isidore Rosenberg, deceased, or against the prop-

erty of plaintiffs, or any of them, and there is no provision of law for the attachment of a lien against said property or proceeding by distraint for the recovery of any erroneous refund or for any other remedy than one of action at law to recover such erroneous refund.

WHEREFORE, plaintiffs pray, and each of them prays, that defendant, as such Collector of Internal Revenue, his successors in such office, his attorneys, deputies and agents may be enjoined and restrained temporarily, until the final hearing, and perpetually thereafter from issuing and levying distraint warrants against the plaintiffs herein, or any of them, and their property, or the property of any of them, and from advertising or offering for sale the above-described property, and from enforcing the collection of said amount of $4,787.60, or any part thereof or interest thereon by distraint or otherwise, and from selling or attempting to sell the property of plaintiffs, or any of them, or any part thereof, [22] and from all trespass on said property, and plaintiffs and each of them, pray for such other and further relief as may be proper in the premises.

ADOLPHUS E. GRAUPNER.
ADOLPHUS E. GRAUPNER,
1120 Balfour Building,
San Francisco, California,
Attorney for Plaintiffs. [23]

City and County of San Francisco,
State of California,—ss.

Claude N. Rosenberg, being first and duly sworn, deposes and says: I am one of the plaintiffs above named and have read the foregoing bill of complaint and know the contents thereof, and the same is true of my knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe it to be true.

CLAUDE N. ROSENBERG.

Subscribed and sworn to before me this 25th day of August, 1931.

[Seal] RAY SOPHIE FEDER,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 25, 1931. [24]

[Title of Court and Cause.]

ACKNOWLEDGMENT OF SERVICE OF ORDER TO SHOW CAUSE.

Service and receipt of a copy of the attached original order to show cause together with a copy of the bill in equity for injunction in the above-entitled proceeding is hereby admitted this 25th day of August, 1931.

JOHN P. McLAUGHLIN,
Defendant,
Collector of Internal Revenue of the United States for the First District of the State of California. [25]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon reading and filing the verified complaint of plaintiffs in the above-entitled action, and good cause appearing therefor,—

IT IS ORDERED, ADJUDGED AND DECREED that the defendant above named show cause, if any he have, on the 31st day of August, 1931, at the hour of 10:00 o'clock A. M., before the above-entitled court at its courtroom in the Post Office Building, 7th and Mission Streets, in the City and County of San Francisco, State of California, why a temporary injunction should not issue, pending the trial of the above-entitled action and until final judgment therein, restraining the said defendant, his attorneys, agents and deputies from in any manner enforcing or attempting to enforce the collection of the sum of $4,787.60 as and for additional estate taxes for the estate of Isidore Rosenberg, deceased, or any part of said sum, or any interest thereon, or from collecting said sum of $4,787.60, or any part thereof or any interest thereon, by distraint or otherwise, and from in any manner levying upon or seizing or selling, or attempting to seize or sell any property or interests of plaintiffs, or any of them, under a certain warrant of distraint issued by defendant on or about May 12, 1930, or otherwise.

Dated, this 25th day of August, 1931.

A. F. ST. SURE,
District Judge.

[Endorsed]: Filed Aug. 26, 1931. [26]

[Title of Court and Cause.]

MOTION TO DISMISS COMPLAINT.

Now comes the defendant herein and moves the court for an order dismissing the complaint for want of equity and for such other and further relief as defendant in law and in equity may be entitled to receive.

GEO. J. HATFIELD,
United States Attorney,
By ESTHER B. PHILLIPS,
Assistant United States Attorney,
Attorneys for Defendant.

Service of the within motion by copy admitted this 29th day of August, 1931.

A. E. GRAUPNER,
Attorney for Plaintiffs.

[Endorsed]: Filed Aug. 29, 1931. [27]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 12th day of October, in

the year of our Lord one thousand nine hundred and thirty-one. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—OCTOBER 12, 1931—ORDER SUBMITTING APPLICATION FOR INJUNCTION PENDENTE LITE.

By consent, IT IS ORDERED that the application for an injunction pendente lite be submitted upon the filing of briefs in 20, 20 and 10 days. [28]

[Title of Court and Cause.]

ORDER GRANTING MOTION TO DISMISS COMPLAINT.

ORDERED that defendant's motion to dismiss plaintiffs' complaint be and the same is hereby GRANTED.

Dated: May 25, 1932.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed May 26, 1932. [29]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 26th day of May, in the year of our Lord one thousand nine hundred and thirty-two. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Court and Cause.]

MINUTES OF COURT—MAY 26, 1932—ORDER GRANTING MOTION TO DISMISS COMPLAINT.

Pursuant to a signed order this day filed, IT IS ORDERED that defendant's motion to dismiss plaintiff's complaint be and the same is hereby GRANTED. [30]

[Title of Court and Cause.]

NOTICE OF ORDER GRANTING DEFENDANT'S MOTION TO DISMISS.

To Plaintiffs Above Named and to A. E. Graupner, Esq., Their Attorney:

You, and each of you, will please take notice that order of the court was entered on the 26th day

of May, 1932, granting the defendant's motion to dismiss the complaint in this case.

GEO. J. HATFIELD.
GEO. J. HATFIELD,
United States Attorney.
ESTHER B. PHILLIPS.
ESTHER B. PHILLIPS,
Asst. United States Attorney.

Service of the within notice by copy admitted this 27th day of May, 1932.

A. E. GRAUPNER,
Attorney for Plff.

[Endorsed]: Filed May 28, 1932. [31]

In the Southern Division of the United States District Court for the Northern District of California.

IN EQUITY—No. 2998-S.

EDGAR D. ROSENBERG et al.,
Plaintiffs,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue, etc.,
Defendant.

DECREE.

The plaintiffs' order to show cause, if any, why a temporary injunction should not issue restraining the defendant from enforcing the collection of additional estate taxes, and the defendant's motion

to dismiss the complaint for want of equity having regularly come on for hearing, and the motions having been argued and submitted, and the court having duly considered the same, and on the 26th day of May, 1932, the court having entered an order that the defendant's motion to dismiss plaintiffs' complaint be granted, now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiffs' motion for a temporary injunction be and the same is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complaint be and it is hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant have his costs herein incurred.

Dated: June 8, 1932.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed and Entered Jun. 8, 1932. [32]

[Title of Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT.

To Plaintiffs Above Named and to A. E. Graupner, Their Attorney:

Please take notice that final decree dismissing the complaint herein was entered on June 8, 1932.

Dated June 8, 1932.

GEO. J. HATFIELD,
United States Attorney,
ESTHER B. PHILLIPS,
Assistant United States Attorney.

Service of the within notice by copy admitted this 8 day of June, 1932.

A. E. GRAUPNER,
Attorney for ————.

[Endorsed]: Filed Jun. 8, 1932. [33]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

To the Honorable A. F. ST. SURE, District Judge:

The above-named plaintiffs, Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg, as individuals, by and through Adolphus E. Graupner, their attorney, feeling aggrieved by the judgment returned and entered in the above-entitled suit on the 8th day of June, 1932, do hereby appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and they severally pray that this appeal be allowed and that a transfer of the record of proceedings upon which said judgment was based and made, duly authenticated, be sent to the United States Court of Appeals for the Ninth Circuit, under the

rules of such court in such cases made and provided and your petitioners further pray that the proper order relating to the security to be required of them be made.

ADOLPHUS E. GRAUPNER.
ADOLPHUS E. GRAUPNER,
1120 Balfour Building,
Attorney for Plaintiffs. [34]

Appeal allowed upon giving bond for costs on appeal in the amount of $250.00.

Dated June 10, 1932.

A. F. ST. SURE,
District Judge.

Due service and receipt of a copy of the within petition for appeal and order allowing same is hereby admitted this 10th day of June, 1932.

GEO. J. HATFIELD,
U. S. Attorney,
Attorney for Defendant.
By ESTHER B. PHILLIPS,
Asst. U. S. Attorney.

[Endorsed]: Filed Jun. 10, 1932. [35]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now come the plaintiffs above named, as individuals, and file the following assignment of errors upon which they will rely, severally and jointly, in the prosecution of their appeal in the above-

entitled suit from judgment made by this Honorable Court on the 8th day of June, 1932:

The court erred in making and entering its judgment against the plaintiffs herein and in favor of the defendant herein upon each and all of the following grounds:

1. That plaintiffs' bill in equity for injunction fully stated adequate and sufficient grounds for equitable relief.

2. That the statement of facts and rights to equitable relief in plaintiffs' bill in equity for injunction were sufficient to require the court to issue order of restraint, or injunction *pendente lite;* and grant unto plaintiffs equitable relief.

3. That the judgment is not in accord with the admitted facts of the bill of injunction.

4. That the judgment is contrary to the laws involved and the applicable rules of equitable relief. [36]

5. That defendant's admission of the facts pleaded in plaintiffs' bill of injunction deprived defendant of any right to judgment.

6. That the court, in entering its judgment, ignored and violated the following applicable sections of the various Revenue Acts and Federal Statutes necessarily involved, and their interpretation by the United States Supreme Court, viz.: Revenue Act of 1921, Sections 406, 407 and 408. Revenue Act of 1926, Sections 316, 308 and 319(a). Revised Statutes, Section 3186(a), 26 U. S. C. A., sec. 115(a).

7. That the court treated the amount sought

to be collected by distraint by defendant as a tax when, as a matter of fact, all taxes had been paid before any assessment for taxes had been made by the Commissioner or notice and demand for payment had been made on the administrator of the estate of Isidore Rosenberg, deceased, by defendant.

8. That the attempt of defendant to collect money from plaintiffs or any of them by distraint proceedings under the admitted facts was without authority or warranty of law and violative of revenue acts or statutes.

9. That no determination of any liability of the plaintiffs for any tax has ever been adjudged or found and defendant is without power to collect by distraint or otherwise any alleged tax from plaintiffs.

10. That the money which defendant seeks to recover by distraint and without court proceedings brought by the United States, is, if anything, an erroneous refund.

11. That plaintiffs are by statutory prohibition (Revenue Act 1926, Section 319(a), deprived of any remedy at law to recover the amount claimed by defendant and are therefore entitled to equitable relief. [37]

12. That the circumstances disclosed by the bill of complaint herein are so extraordinary, exceptional and irremediable (as well as illegal) that Section 3224, U. S. Revised Statutes (26 U. S. C. A., Section 154) may not apply to deprive plaintiffs of equitable relief.

Court may upon not less than ten days notice to the surety above named proceed summarily to ascertain the amount which said surety is bound to pay on account of such breach and render judgment therefor against said surety and award execution therefor.

Dated this 8th day of June, 1932.

UNION INDEMNITY COMPANY. [Seal]
By JOHN D. HAVERKAMP,
Attorney-in-fact.

State of California,
City and County of San Francisco,—ss.

On this 8th day of June, 1932, before me appeared John D. Haverkamp, to me personally known, who being by me duly sworn, did say he is the agent and attorney-in-fact of the Union Indemnity Company of New Orleans, La.; that the seal affixed to the foregoing instrument is the corporate seal of the said corporation, and that the said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors, and the said John D. Haverkamp acknowledged that he executed said instrument as such agent and attorney-in-fact and as the free act and deed of said corporation.

[Seal] CON T. SHEA,
Notary Public San Francisco City and County.
My commission expires 7/30/35.

Approved.

A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed Jun. 11, 1932. [40]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby requested and directed to prepare and certify a transcript of the record in the above-entitled suit for the use of the Circuit Court of Appeals of the United States for the Ninth Circuit, by including therein the following papers:

1. Bill of complaint in equity for injunction.
2. Order to show cause.
3. Motion to dismiss.
4. Minute-book entry, dated October 12, 1931, ordering order to show cause and motion to dismiss to be submitted on briefs.
5. Minute-book entry of order of dismissal of bill of complaint, dated May 26, 1932.
6. Notice of order granting defendant's motion to dismiss.
7. Decree.
8. Notice of entry of decree.
9. Petition and order for appeal.
10. Bond on appeal.
11. Assignment of errors. [41]
12. Citation to the appellee.
13. Praecipe for transcript of record.

Dated: June 11th, 1932.

ADOLPHUS E. GRAUPNER.

ADOLPHUS E. GRAUPNER,

Attorney for Plaintiffs and Appellants,

1120 Balfour Building.

Receipt of a copy of the within praecipe is hereby admitted this 11th day of June, 1932.

GEO. J. HATFIELD,
Attorney for Defendant and Respondent.

[Endorsed]: Filed Jun. 11, 1932. [42]

District Court of the United States, Northern District of California.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 42 pages, numbered from 1 to 42, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Edgar D. Rosenberg et al. vs. John P. McLaughlin, etc., No. 2998–S., as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $8.30, and that the said amount has been paid to be by the attorney for the appellants herein.

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court, this 16th day of June, A. D. 1932.

[Seal] WALTER B. MALING,
Clerk.

B. E. O'Hara,
Deputy Clerk. [43]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Northern District of California,—ss.

To John P. McLaughlin, Collector of Internal Revenue and to the United States Attorney for the Northern District of California, GREETING:

You are hereby cited and admonished to be and appear at the Circuit Court of Appeals at the City and County of San Francisco, State of California, on the 8th day of July, 1932, pursuant to an order allowing an appeal filed and entered in the Clerk's office for the District Court of the United States for the Northern District of California, from the final judgment or decree signed, filed and entered on the 8th day of June, 1932, in that certain suit being numbered 2998–S. in the files and records of said court, wherein Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg are plaintiffs and appellants, to show cause, if any there be, why the judgment or decree rendered against said appellants, as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, Judge of the United States District Court for the Northern District of California, this 11th day of June, 1932.

A. F. ST. SURE,
Judge.

Receipt of a copy of within citation on appeal is hereby admitted this 11th day of June, 1932.

GEO. J. HATFIELD,

Attorney for Defendant and Respondent.

Filed Jun. 11, 1932.

[Endorsed]: No. 6872. United States Circuit Court of Appeals for the Ninth Circuit. Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg, Appellants, vs. John P. McLaughlin, Collector of Internal Revenue for the First District of California, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 17, 1932.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 6872

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDGAR D. ROSENBERG, HELEN ROSENBERG KAHN and CLAUDE N. ROSENBERG,
Appellants,

vs.

JOHN P. MCLAUGHLIN, Collector of Internal Revenue for the First District of California,
Appellee.

BRIEF FOR APPELLANTS.

ADOLPHUS E. GRAUPNER,
Balfour Building, San Francisco,
Attorney for Appellants.

FILED
DEC 16 1932
PAUL P. O'BRIEN,
CLERK

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No. 6872

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDGAR D. ROSENBERG, HELEN ROSENBERG KAHN and CLAUDE N. ROSENBERG,
Appellants,

vs.

JOHN P. McLAUGHLIN, Collector of Internal Revenue for the First District of California,
Appellee.

BRIEF FOR APPELLANTS.

This is an appeal from judgment of the United States District Court for the Southern Division of the Northern District of California dismissing appellants' complaint therein upon appellee's motion.

I. STATEMENT OF CASE.

The bill of complaint (Tr. 1-30) seeks to enjoin sale of appellants' property under distraint *where appellants are not taxpayers; where no tax liability against them has been determined* by the Commissioner of Internal Revenue; *where the Commissioner*

has refused to proceed against them by mailing deficiency notices or by suit in Court to determine their liability as transferees or distributees; where, if they pay the amount claimed by the government, *they are prevented from recovery thereof; where trespass on and irrecoverable damage to appellants' property will result* if appellee proceeds as he threatens, and where appellants are without plain, speedy and adequate remedy at law.

II. THE FACTS.

The facts are stated in the bill of complaint. (Tr. 1-30.) Their truth stands admitted under appellee's motion to dismiss. (Tr. 33.) Those facts disclose the illegal and arbitrary acts contemplated by the appellee.

This proceeding arises over claim of deficiency against the estate of Isidore Rosenberg, deceased, and the attempt of appellee to collect by distraint from the appellants, distributees under the will of said deceased, an *alleged* deficiency in tax asserted only against said estate.

Isidore Rosenberg died May 23, 1923, while the 1921 Act was in force, and his widow, Natalie Rosenberg, was appointed executrix of the estate. On December 31, 1923, *less than a year* after the death of said decedent, the executrix filed estate tax return in which she reported the estate tax to be $7,791.04. *The entire tax was paid* on the day the return was filed. (Tr. 2-3, pars. IV, V.)

On March 24, 1924, said executrix filed a claim for refund of $5,181.90 of the estate tax paid. Before the Commissioner acted upon said claim the estate of Isidore Rosenberg was distributed, without any additional tax being asserted against said estate, July 10, 1924. (Tr. 3-6, pars. VI-X.)

Said Natalie Rosenberg died February 7, 1925, and after advice that said claim for refund would be allowed to the estate of Isidore Rosenberg, Edgar D. Rosenberg, on April 6, 1925, was appointed administrator with the will annexed of said estate for the purpose of collecting said refund. The claim was allowed in the amount of $4,787.60 and was paid to the administrator, who immediately distributed the same. (Tr. 8-9, pars. XII, XIII, XIV.)

The Revenue Act of 1926 was enacted on February 26, 1926, and on September 25, 1926, the Commissioner determined a deficiency in tax against said estate and mailed to Edgar D. Rosenberg, as administrator thereof, a deficiency notice for $7,839.07. Of said amount $3,051.47 was alleged to be an additional tax and $4,787.60 was stated as the amount of refund claimed to have been erroneously paid to said administrator. (Tr. 10-11, pars. XVI-XVII.) From this notice the administrator appealed to the Board of Tax Appeals and decision adverse to said administrator was rendered on January 26, 1929. (Tr. 11, par. XVII.)

On February 27, 1929, prior to any assessment by the Commissioner, said administrator paid from his personal funds the amount of $3,051.47, together with

$867.77 interest thereon. (Tr. 11, par. XVIII.) Thereafter, on July 27, 1929, the Commissioner assessed an alleged additional estate tax *against said estate* in the amount of $7,839.07, together with interest amounting to $1,556.40, ignoring the tax paid as aforesaid. At that time and ever since the distributions hereinabove alleged, *said estate had no assets.* On May 12, 1930, appellee mailed to said administrator notice of issuance of distraint warrant against him for $4,787.60. (Tr. 11-14, pars. XIX-XXII.)

No assessment has ever been made against appellants nor has any distraint warrant ever been issued against them. (Tr. 12, par. XXI.)

In response to appellee's said notice and demand, said Edgar D. Rosenberg, as such administrator and also as an individual, wrote the appellee and also the Commissioner advising them that the estate of Isidore Rosenberg had been long before distributed, protesting the distraint proceeding, and requesting the Commissioner to resort to the proceedings provided in Sections 316 and 308 of the Revenue Act of 1926 in order that the appellants might defend themselves as transferees against the claim for alleged liability. A letter of similar import was written to appellee and said Commissioner by appellant, Claude N. Rosenberg, on behalf of himself and his coappellants. (Tr. 14, 15, 16, 19, 21, 22, pars. XIII, XXIV, XXVIII, XXIX.) To these letters the Commissioner replied, refusing to resort to transferee proceedings against appellants and insisting that a lien survived under Section 409 of the Revenue Act of 1921, which was sufficient to

warrant distraint proceedings and stating that the appellee was instructed to proceed with distraint. (Tr. 15, 16, 19, 20, 31, pars. XXIV, XXVIII, XXIX, XXX.

On August 17, 1931, appellee mailed notices to each of the appellants advising them that under warrant of distraint he intended to sell a portion of the real property owned by them and described in said notice for unpaid estate taxes amounting to $4,787.60, together with interest thereon *which had been assessed* against the estate of Isidore Rosenberg, deceased. No such notice was served on the administrator of the estate, as such, and no distraint warrant was issued against the appellants. (Tr. 22-24, par. XXXI.)

On August 25, 1931, appellants commenced this proceeding to enjoin the appellee from selling their property, and on June 8, 1932, the District Court entered judgment dismissing appellants' complaint, from which this appeal is taken. (Tr. 36, 37.)

The Court below rendered no opinion. Therefore, being uninformed as to the reasons for the Court's decision, it becomes necessary to extend our arguments in this brief to meet appellee's contentions in the Court below.

III. THE ISSUES.

The issue presented by the appellee to the Court below was: "Will injunction lie to restrain the collection of Federal estate taxes duly assessed, after liti-

gation of the merits before the United States Board of Tax Appeals, out of *distributed* property *on which a Federal tax lien attached at the death of the testator"?* (Italics supplied.)

The foregoing statement of the issue herein involved presents two false assumptions, viz.: (1) that the merits of appellants' position were presented to the Board of Tax Appeals for adjudication, and (2) that any lien attached to the estate of decedent at the date of his death or at any other time.

The issues presented by the appellants are fully presented in this brief, but may be concretely stated as follows:

1. No lien for estate taxes ever attached to the property of the estate of Isidore Rosenberg, deceased, and there is no lien which may be exercised against appellants.

2. Appellee is attempting to sell unlawfully property belonging to appellants when no tax liability of any nature exists against them and the Commissioner of Internal Revenue has refused to take the necessary statutory steps to determine whether a liability exists.

3. By specific statutory provision found in Sections 316 and 308 of the Revenue Act of 1926, and under the facts, appellants are entitled to injunction against appellee to prevent distraint or sale under warrant of distraint of the property which appellee threatens to sell.

IV. ASSIGNMENTS OF ERROR AND GROUNDS THEREFOR.

The assignments of error are set forth on pages 39 to 41 of the transcript. Rather than repeat them, we will outline the conditions of law and fact represented by such assignments.

1. Appellee claims a lien exists against appellants' property for alleged estate taxes under Section 409 of the 1921 Act, after that Act had been repealed and where the estate *had been distributed five years before* any assessment for additional taxes against it had been made. (Tr. 4, 5, pars. VIII, IX; Tr. 40, par. 6.)

2. The appellee on August 17, 1931, served notice on each of the appellants that under warrant of distraint, issued against the administrator only, he had levied upon and would proceed to sell at public auction an undivided ten-forty-eighth interest in the property described in the notices and asserted to be the individual interest of each in the property, as opposed to the one-sixteenth interest which each received from the estate. (Tr. 6, par. IX; Tr. 22, 23, par. XXXI.)

3. The appellee is arbitrarily attempting to proceed against appellants under Section 409 of the 1921 Act on the theory that a lien continued against property formerly belonging to the estate (Tr. 40, par. 3), even though the section had been repealed and all estate taxes had been paid. Due to the changes made in the Revenue Act of 1926, Section 409 is not applicable to the issue of transferee liability involved in

this case, *because under Sections 316 and 308 of the 1926 Act the Commissioner is required to follow definite proceedings regarding transferees,* which he has refused to observe and has instructed the appellee to ignore. (Tr. 14, 15, 16, 19, 20, 21; pars. XXIII, XXIV, XXVIII, XXIX, XXX.)

4. Due to the restriction found in Section 319 (a) of the Revenue Act of 1926, appellants may not pay the amount sought to be collected from them and seek refund of the same by action at law because the administrator of the estate brought proceedings before the Board of Tax Appeals involving the amount at issue here (Tr. 41, par. 11) and, also, because such payment would be voluntary by one other than the taxpayer and, therefore, beyond recovery at law.

5. The appellee, the Commissioner, and the Federal government have brought no proceedings against appellants, or any of them, to enforce the payment of any transferee liability and have thus deprived appellants of any and all defenses, at law or in equity, against the liability which appellee illegally seeks to enforce. (Tr. 41, par. 9.)

6. No proceedings have been brought against appellants, as required by Sections 316 and 308 of the Revenue Act of 1926 to determine whether they are liable as distributees of the estate of Isidore Rosenberg, deceased, and they and each of them have been deprived of their rights at law and their rights of defense by the refusal of the Commissioner of Internal Revenue to bring such proceedings. (Tr. 41, par. 8.)

7. Appellee is attempting to sell the property of appellants under a distraint warrant issued against the administrator of a barren estate and not against appellants, when no liability has ever been determined against appellants, or any of them, no assessment has been made against them, or any of them, and appellee is without authority to distrain against them. (Tr. 41, par. 8.)

8. The appellants *are not* "the taxpayer" specified in the statutes, against whom the alleged tax was assessed. (Section 2 (a) (9), Revenue Acts of 1921 and 1926.)

9. The only remedies available to appellants (after threat of sale of their property) were protests against the illegality of the proposed sale under distraint warrant issued against the administrator. Such protests were made and denied by appellee at the direction of the Commissioner. (Tr. 14, 15, 16, 19, 20, 21.)

10. The sale of appellants' property under the present distraint warrant and the notices sent to appellants (Tr. 22, par. XXXI) would result in trespass and cause irreparable and irrecoverable loss and damage to them, without power to recover the tax and interest paid, or possession of the property sold, or the resultant damages which they will suffer by appellee's actions. (Tr. 41, par. 12.)

V. ARGUMENT.

1. THE FALLACY OF THE CLAIM OF STATUTORY LIEN UPON WHICH APPELLEE RELIES.

The Commissioner asserts that a lien exists under Section 409 of the 1921 Act by which he can force appellants to pay a tax not assessed against them and has directed the appellee to proceed to sell appellants' property under assessment and distraint warrant *directed solely to the administrator* of the estate of Isidore Rosenberg, deceased. This completely ignores Sections 316 and 308 of the Revenue Act of 1926. (See Title 3 of this Argument, post.)

Sections 406 to 409 of the Revenue Act of 1921 show the proper application of Section 409 of that Act and the lien assertable thereunder. Section 406 provides "that the tax *shall be due and payable one year after decedent's death.*" (Italics supplied.)

Section 408 refers to one year after death as the "*due date.*" Without possibility of reference to any other time than the "due date" or any other section than 408, Section 409, which applies only to taxes *and not to deficiencies or erroneous refunds,* which are the only liabilities here involved, provides that the *tax* shall become a lien "unless sooner paid in full." Not a single decision definitely considers Section 409 and holds that a lien attaches thereunder, before the "due date" fixed by Section 406 and remains enforceable if the tax is paid.

As the tax was paid before the "due date," there was no lien under Section 409. *Payment satisfied the tax and discharged the lien.* All authority to proceed

further under any alleged lien ended. (*Kelley v. U. S.*, 30 Fed. (2d) 193, par. (1).) So, during the years 1922, 1923, 1924 and 1925, there was and could be no active or hibernating lien against the estate.

In 1925 the Commissioner determined an over-assessment and granted a refund. This action definitely marked the abandonment of any claim of lien under Section 409, because a refund could not indicate a surviving tax liability. The estate had been distributed and no "gross estate" survived to be charged with a tax or affected by a lien. No lien contemplated by the 1921 Act could continue to exist upon the mere assumption that at some future time a liability for tax against the estate might arise, for all authority to proceed further under any alleged lien was ended by payment of the tax. If such liability subsequently arose, it could arise only under the provisions found in the Revenue Act in force at the time it was discovered, because the estate tax provisions of the 1921 Act had been repealed.

A case which directly considered the survivor of a lien for estate taxes is *Kelley v. U. S.*, 30 Fed. (2d) 193, where this Court had before it Section 409 of the Revenue Act of 1918 (which is identical with Section 409 of the 1921 Act). Therein the government notified the executrix of the estate that there remained unpaid the amount of a refund against the estate and demand was made for the payment of the same. The executrix refusing to pay, suit in equity was filed by the government asserting its claim upon lien. The District Court decided in favor of the gov-

ernment, but upon appeal to this Court, the case was remanded. In its decision the Court said:

> "When once paid, a tax is gone, and a refund of the money does not restore it. 'If the owner or any other person entitled to make payment of the tax shall do so, *the lien will not only be discharged absolutely, but all authority to proceed further against the property* will be at an end.'" (Italics supplied.)

This statement of the Court is decisive of the fact that no lien under Section 409 of the 1921 Act, which relates only to taxes, survived or left any power in appellee to assert a lien under that section after the tax was paid. The Court held in the *Kelley* case that the government had no rights in equity and said that its only remedy was at law.

The general rule applicable to sale of land on lien for nonpayment of taxes is well established by the Supreme Court of the United States and has been steadily maintained throughout the years, viz.:

> "In order to support a statutory lien for taxes, all the prerequisites of the law granting the lien must be strictly complied with."
>
> *Thacher v. Powell*, 6 Wheat. 119;
> *Parker v. Rule's Lessee*, 9 Cranch 64;
> *Early v. Doe*, 16 Howard 610;
> *Williams v. Peyton*, 4 Wheat. 77;
> *Ronkendorff's Case*, 4 Pet. 349;
> *U. S. v. Allen*, 14 Fed. 263.

Numerous other cases might be cited to show that this rule has been maintained down to the present

day. These cases applicable to the enforcement of liens clearly show that under the rule laid down in *Kelley v. U. S.*, supra, the appellee could in no way legally sell the property of appellants under the provisions of the discharged and repealed provisions of Section 409 of the 1921 Act.

At this point we might call the Court's attention to the well established rule laid down in *Gould v. Gould*, 245 U. S. 151; 62 L. Ed. 211, that tax statutes will not be extended by implication but, "in case of doubt they are construed most strongly *against the government*, and in favor of the citizen."

The estate tax provisions of the 1921 Act were repealed by Section 1100 of the 1924 Act. There being no living lien at the time of such repeal, no lien survived to be enforced. The estate tax provisions of the 1924 Act were repealed by Section 1200 of the 1926 Act and nothing arose to create a lien under the 1924 Act.

The 1926 Act, which repealed the estate tax provisions of the 1924 Act, took effect February 26, 1926, so that, when the Commissioner asserted a deficiency against the estate on September 25, 1926, any lien which he might attempt to assert could be imposed only in compliance with Section 318(a) of the 1926 Act, limited by the restrictions of Sections 308 and 316 of that Act. Section 315(a) is only applicable to a lien for an original *unpaid tax* and *not for a transferee liability* or for a deficiency, such as is herein involved. Section 318(a) of the 1926 Act is

the only method by which a lien could be placed on the gross estate where it is sought under a deficiency, *but even this section does not apply to transferees.*

To lien the property in the hands of the distributees, the Commissioner must first determine and establish their liability, then assess the amount established and then cause the appellee to give notice and make demand for payment upon appellants. (See Title VII, post.) The lien could arise only when an assessment list against appellants was received by the appellee (R. S. Sec. 3186, 26 U. S. C. A. Sec. 115(a)) and no such assessment has been made. (Tr. pp. 26, 27, 28, par. XXXVIII 5, 6, 7.)

> "A statutory lien arises and exists only where there has been at least a substantial compliance *with all the statutory requisites* essential to its creation and existence." (Italics supplied.)
>
> 37 *C. J.* 323 and notes.

> "A tax levied and assessed * * * *is not* a lien * * * unless expressly made so by statute, and an intention to this effect must be clearly manifested in the statute, as the lien will neither be created by implication nor enlarged by construction. Nor will a statutory provision of this kind be given a retrospective operation unless plainly required by its terms. Further *the repeal of the statute will divest the liens* which it created, unless they are expressly or impliedly reserved." (Italics supplied.)
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> 37 *Cyc.* 1138;
>
> *In re Wyley Co.,* 292 Fed. 900, 901.

"When a statute limits a thing to be done in a particular mode it includes the negative of any other mode."

Botany Worsted Mills v. U. S., 278 U. S. 282, 289; 73 L. Ed. 379, 385.

"A distress warrant is process in the nature of execution, but it must be authorized by statute. * * * Being a severe remedy, *it is restricted in its operation to the person against whom the tax is assessed,* and the officer executing it is very strictly limited in respect to the taxes he may enforce in this manner * * * *and all other matters* affecting the rights of the delinquent." (Italics supplied.)

37 *Cyc.* 1236.

The estate of the decedent was distributed before any deficiency was found. The laches of the Commissioner, and his failure or neglect to comply with statutory requirements, cannot create a lien nor warrant the present attempt to assert a lien under a statute which had been repealed before the Commissioner found a deficiency against a barren estate. (Section 318(a), Revenue Act of 1926.) *No steps for assessment against appellants have been taken by him.* Hence, there is not, and cannot be, a present lien as far as appellants are concerned. *There being no assessment or lien, there can be no valid distraint,* particularly when no warrant of distraint has been issued against appellants.

The fatal defect in appellee's attempted procedure is that he relies upon a lien under Section 409 of the

1921 Act when such a lien never existed, or, if it existed, it was discharged by payment of the tax on the estate and by the repeal of the lien provisions. The estate was distributed at a time when it was free from all liens. Even if we accept appellee's erroneous argument that a lien attached to the estate when the decedent died, that lien was discharged by payment of all taxes due or determined before distribution of the estate of the appellants. The appellants, therefore, received their property by distribution in innocence and good faith, and free from lien.

Not until a deficiency in tax was determined by the Commissioner in 1926 (Tr. 10, 11, pars. XVI, XVII) did opportunity for lien arise. Then there was no estate. Then, by sending a sixty-day deficiency letter to the administrator in compliance with Section 308 of the 1926 Act, did the Commissioner admit that he had no claim of lien under the 1921 Act. The judgment obtained by the Commissioner from the Board of Tax Appeals and against the administrator, led to assessment of a deficiency. But there was no property in the hands of the administrator upon which a lien could be placed. A lien cannot be placed upon a vacuum, and the estate of Isidore Rosenberg was a vacuum long before the Commissioner determined his alleged deficiency. (Tr. 4, pars. VIII, IX.)

Having once resorted to the Revenue Act of 1926 to determine a deficiency, the Commissioner must abide by that Act and take such further proceedings thereunder as that Act requires to render transferees liable. The Board of Tax Appeals found a deficiency

only against a barren estate. The Commissioner assessed a deficiency on such estate (which had no funds to satisfy the deficiency) and the Act provided for a separate and complete method of determining the liability of transferees on a deficiency and pursuing them through to assessment on such liability. As the Commissioner failed to follow through the prescribed course found in the 1926 Act, appellee is without authority to collect from the transferees until the Commissioner does so proceed.

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2. ANALYSIS OF APPELLEE'S CLAIM TO LIEN UNDER DECISIONS.

The Commissioner refused to pursue appellants as transferees under Sections 316 and 308 of the Revenue Act of 1926 under assertions that a lien survived under Section 409 of the Revenue Act of 1921, and based his refusal on the following quoted portion of *Page v. Skinner*, 298 Fed. 731, 732 (2):

> "Imposition of the estate tax takes effect at the time of death, and *the tax becomes at once a lien* on estate property enforcible by sale, *if not paid.*" (This case involved the Revenue Act of 1918, and was decided in 1924, prior to the enactment of the Revenue Act of 1926.) (Italics and parenthetical note supplied.)

Upon the above brief quotation the Commissioner asserts that once an estate tax lien attaches to property, transferee proceedings are not necessary for the continuance, validity, or enforcement of the lien. In

other words, *the position assumed* by the Commissioner and passed to the appellee for enforcement *is that a lien attaches to property of an estate before a tax is due thereon and continues after the tax is paid.*

This position is false and contrary to Sections 409 of the 1921 Act and 315(a) of the 1926 Act, which agree that no lien arises unless the tax remains unpaid. Moreover, *Page v. Skinner* cannot be applied to the facts of the present case where the issue involves a *deficiency* and not a tax. The Revenue Act of 1926 makes separate and definite provisions for the treatment of "deficiencies." (Sections 316(a), 318(a) and 308(a).) Furthermore, the language of the decision relied upon states that the tax becomes an enforcible lien only *"if not paid,"* and the tax was paid in this case. Both the decision and the statutes are adverse to appellee's position.

Page v. Skinner (supra) did not involve a lien for taxes and the decision *omits* reference to any lien provisions of any Revenue Act. The case was *an action to recover a tax* which had been paid and *no tax lien could be at issue.* The decision does not indicate any consideration of the incidents of an estate tax lien and is not applicable to this case in the slightest degree.

The actual issue in *Page v. Skinner* was whether an hiatus existed which permitted the estate there involved to escape tax under the repeal provisions found in Section 1400 of the Revenue Act of 1918, which was not passed until March 3, 1919. The proceeding was one to recover an estate tax paid and contained

no element relating to a lien. The Court relied upon *New York Trust Co. v. Eisner,* 256 U. S. 345, 347; 65 L. Ed. 963, 982. This latter case involved *no* lien for taxes, but was a suit brought by the executors of an estate to recover a tax paid. The decision did not pass upon the question as to when a lien arose or how long it lasted, except by reference to Section 207 of the 1916 Act which provides for a lien when the tax is not paid. This decision in no way involves the issues of *Page v. Skinner* and is no support for the *dictum* there announced. The *dictum* of *Page v. Skinner* quoted above stands without authority of statutory support or decision of Court to warrant the appellee's interpretation thereof. No Court may create law by decision in direct conflict with a statute not presented to the Court for interpretation and not considered. Moreover, the Supreme Court of the United States has held directly opposite to the doctrine upon which appellee relies and which *Page v. Skinner* supports only in *obiter dictum.* (*United States v. Woodward,* post.)

Quite a number of cases have cited *Page v. Skinner* (supra), but *all relate to the time when* an estate becomes subject to a tax *and not to the time a lien attaches.*

As *no lien* or statute relating to a lien was involved in any of the such cases, what may be said in any of them in relation to liens is of no force or effect in the determination of when a lien attaches under any of the Revenue Acts involved in this case. Also, the time and method of asserting a lien for estate tax

where a deficiency is found is governed by the Act in force at the time of determination of such deficiency. (*U. S. v. Cruickshank,* 48 Fed. (2d) 352, 356.) Furthermore, the recognition of *Page v. Skinner* as authority on any point includes the recognition that a lien exists only to the time when the tax is paid.

The procedure for the fixation of tax liability under the 1921 Act was repealed or assimilated by Section 318(a) of the 1926 Act. If in the year 1926, as in this case, the Commissioner found an additional tax or deficiency in tax to be due, he had no lien to rely upon and could make no assessment to create a lien except by following the requirements of that section. The requirements of Section 318(a) of the 1926 Act absolutely upset all of the contentions of the appellee in this case that there was a continuing lien under Section 409 of the 1921 Act, despite the fact that all taxes had been paid. Section 318(a) requires the Commissioner to resort to Section 308 for the assessment and collection of additional taxes, while Section 316 (which existed in no prior Act) forces him to rely on Section 308 for the assessment and collection of a transferee's liability. (*U. S. v. Cruickshank,* 48 Fed. 352, 355.)

In *United States v. The Pacific Railroad,* 1 Fed. 97, the Circuit Court, E. D. of Missouri, had before it the question of a lien for taxes under Section 3186, Revised Statutes. (26 U. S. C. A. 115.) That section, in principle of application, does not differ from Section 409 of the 1921 Act which the Commissioner relies upon as the basis of his instruction to proceed by dis-

traint proceedings in this case. There the Court said (page 103):

> "*The lien is not created by the law itself,* without any action by officers under the law, though a debt may be thus created. The liability of the taxpayer is one thing; *the creation and enforcement of a lien,* especially against innocent parties, *is another and different thing.*" (Italics supplied.)

Applying this statement to Section 409 (supra) it will be seen that no lien could attach thereunder until some tax became due and payable thereunder and then, only if it was assessed, demand for payment made, and distraint warrant issued against the transferees. That this interpretation is proper is shown by a further quotation from the same decision (page 102):

> "Here the object is not to enforce a common-law remedy in the collection of an admitted indebtedness, but to enforce a statutory lien against property which was once the property of the debtor, but is now in the possession and ownership of others. It is well settled that, *in order to enforce a statutory lien for taxes, all prerequisites of the laws* granting the lien *must be strictly complied with.*" (Citing cases.) (Italics supplied.)

Section 409 does not contemplate a lien for any deficiency. That section provides only for an original "tax unpaid" and not a deficiency in tax as contemplated by the 1926 Act. While Section 409 of the 1921 Act was in force there was no provision relating

to a "deficiency" and particularly none which related to an erroneous refund incorporated in a "deficiency." Then the government had no other recourse than suit in Court to recover against transferees or to recover the amount of an erroneous refund. The only lien which could be created at the time a deficiency was determined in this case would be under the 1926 Act.

The case of *United States v. Woodward,* 256 U. S. 632, 635, 65 L. Ed. 1131, 1135, considers the estate tax provisions of the Revenue Act of 1916. (The same Act which is considered in *Page v. Skinner,* supra, and upon which the Commissioner relies in this case.) Mr. Justice Van Devanter, in delivering the opinion of the Court, said:

> "The Act of 1916 calls the estate tax a 'tax,' and particularly denominates it an 'estate tax.' This court recently has recognized that it is a duty or excise, and is imposed in the exertion of the taxing power of the United States." * * * "*It is made a charge on the estate, and is to be paid out of it by the administrator or executor,* substantially as other taxes are paid. *It becomes due, not at the time of the decedent's death,* as suggested by counsel for the government, *but one year thereafter,* as the statute *plainly provides.* It does not segregate any part of the estate from the rest, and keep it from passing to the administrator or executor for purposes of administration, as counsel contend, but is made a general charge on the gross estate, and is to be paid in money *out of any available funds,* or, if there be none, by converting other property into money for the purpose." (Italics supplied.)

Here is a direct denial by the Supreme Court of the *dictum* found in *Page v. Skinner* quoted above. The case did not involve the issue of a statutory hiatus or exemption; it directly holds that no estate tax *becomes* due or enforcible by lien until one year after the decedent's death.

In *Wilmington Trust Co. v. U. S.,* 28 Fed. (2d) 205, 207, (from which decision the government took no appeal) the issue was the "due date" of an estate tax under the Revenue Act of 1921. The Court therein said:

> "Section 408 of that act" (Revenue Act of 1918) "made the estate tax 'due one year after the decedent's death.' Dealing in part with identical language found in the Revenue Act of 1916, Sec. 204, 39 Stats. 778 (Comp. St. Sec. 6336½E), the Supreme Court, in U. S. v. Woodward, 256 U. S. 632, 41 S. Ct. 615, 65 L. Ed. 1131, declared that thereunder 'the estate tax becomes due, *not* at the time of the decedent's death, as suggested by counsel for the government, but one year thereafter, as the statute plainly provides,' and held that the tax 'accrued' when it became due. In United States v. Mitchell, 271 U. S. 9, 10, 46 S. Ct. 418, 70 L. Ed. 799, the court, dealing with the same statute, said without qualification that 'the federal estate tax accrued one year after her (the decedent's) death.'" * * *
>
> "Congress, in the passage of the act of 1921. was aware of and recognized this meaning of the term, for in section 214(a) (3) it declared: 'For the purpose of this paragraph *estate,* inheritance, legacy and succession *taxes accrue on the due date thereof* except as otherwise provided by the law

> of the jurisdiction imposing such taxes' * * * It is true that in Page v. Skinner, 298 Fed. 731, 735 (C. C. A. 8), the word 'accrued' was more broadly defined; *yet as no authority was cited to support that finding,* as no reference was made to Supreme Court cases, and *as the meaning there given to that term is directly opposed* to the meaning assigned to it by the Supreme Court, I think this decision should not be here followed." (Italics supplied.)

In considering the status of the alleged lien, we again refer to Section 308(a) of the Revenue Act of 1926 in its application to transferees under Section 316. That section provides that *"no assessment"* and *"no distraint"* shall be made, begun or prosecuted unless a 60 day letter or notice has been mailed to the transferees. It is admitted that no assessment has been made against the appellants as transferees. Therefore, as Section 316 provides that transferees shall be proceeded against in the same manner as taxpayers, there can be no lien until after assessment against the transferees, and no distraint proceeding may be pursued until after assessment.

We have dwelt at length upon the illegality of the lien claimed by appellee under Section 409 of the 1921 Act and with the case of *Page v. Skinner* (supra) which he has relied upon to support his position, not because there is merit in his contention, but because explanation thereof shows the fallacy of his position.

3. APPELLEE'S CLAIM TO ALTERNATIVE REMEDIES.

Appellee contends that he has three alternative remedies, viz.: (a) The right to proceed in Court against appellants, (b) the right to proceed against them as transferees under Sections 316 and 308 of the 1926 Act, and (c) where there is an existing lien, the right to enforcement thereof under distraint proceedings.

The government did not proceed against appellants on alternatives (a) and (b). Therefore, we need not discuss these two remedies other than to say that appellants have been denied their benefit.

Regarding the third alternative (c), we say that under the facts herein there can be no existing legal lien on the property of appellants which appellee may now enforce through distraint proceedings. As this Court said in *Kelley v. United States,* 30 Fed. (2d) 193:

> "If the owner or any other person entitled to make payment of the tax shall do so, *the lien will not only be discharged absolutely, but all authority to proceed further against the property will be at an end."* (Italics supplied.)

So any lien against the gross estate of Isidore Rosenberg, deceased, under Section 409 was discharged by payment of the tax before the due date.

When, in 1926, the Commissioner determined a deficiency tax against the estate of Isidore Rosenberg, deceased, the 1921 Act had been repealed and a new law governed liens and their creation. Appellee and

the Commissioner are attempting to illegally evade that changed situation.

Section 314 (a) of the 1926 Act provides that if the tax is not paid on or before the "due date," the collector upon instructions from the Commissioner shall proceed to collect the tax under the provisions of general law or by proceedings in Court. However, that section proceeds to provide: "This subdivision *in so far as it applies to the collection of a deficiency shall be subject to the provisions of Section 308.*" (Italics supplied.) Thus, *if the Commissioner finds an additional tax (a deficiency)* against the executor or administrator of an estate *there can be no lien under Section 314 (a)* until the Commissioner proceeds against the representative of the estate under Section 308 of the 1926 Act. The deficiency in this case was determined against the administrator (Tr. 11, par. XVII) but appellee attempts to act thereon against appellants without further procedure.

The gross estate having disappeared through distribution, the determination by the Commissioner of a deficiency against the barren estate and the decision of the Board created no lien against anything, because there was no gross estate. *Even if it had created a lien, it would not have affected appellants' rights to a hearing,* because the statute calls on the Commissioner for additional proceedings against transferees.

Section 316 (a) makes it mandatory on the Commissioner to proceed against the transferees, in the same manner as he would proceed against an ad-

ministrator, in event of a *deficiency* in tax being found and the estate being without assets from which to collect the tax determined. This *mandatory* step has not been taken in this case and, therefore, the Commissioner *may make no assessment* against appellants and appellee *may take no steps against appellants.* Section 316 (a) (1) of the 1926 Act is specifically applicable to the liability of transferees imposed by any prior Estate Tax Act because Section 318 (a) of the 1926 Act directly provides that *the determination of any tax or deficiency* in respect to any estate tax imposed by the 1921 Act "shall be assessed, collected and paid" in the same manner and under the same limitations as in the case of a deficiency under the 1926 Act.

Thus, under Section 314 (a) of the 1926 Act, the third alternative (c) claimed by appellee does not exist in this case, where only a deficiency is involved, because that section does not apply to deficiencies by its express language. Section 318 (a) makes this point still more definite. Therefore, appellee is without power to sell appellants' property under claim of lien and to attempt to do so would constitute trespass and violate Amendment V of the U. S. Constitution.

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4. APPELLANTS' POSITIVE RIGHT TO INJUNCTION.

The Revenue Acts of 1921 and 1924 contained no provisions for determining or asserting "a liability, at law or in equity," against the distributees of an estate, as transferees, for an estate tax. Suit might

have been brought to recover under the equitable trust doctrine to enforce such liability, but the government took no such step.

Under the Act of 1921 the government had but two methods of procedure against taxpayers. (1) To collect the tax against an estate under the provisions of general law, or (2) to bring proceedings in any Court of the United States against the executor or the distributees of an estate to subject the property which passed from such estate to be sold under judgment or decree of the Court. The government rights under the first method have been changed by Sections 316 and 308 of the 1926 Act which are specifically made applicable to "prior acts." (*U. S. v. Cruickshank,* 48 Fed. (2d) 352, 353.) The government's right to bring suit against transferees is doubtful, but it has not attempted to exercise any such method of recovery against appellants.

We direct the Court's attention to the fact that, excepting the right to claim refund (which does not exist here), *the initiative which permits a taxpayer or transferee to sue or defend rests on the government* and is not granted to the taxpayer or his transferees.

On June 10, 1924, when the estate of Isidore Rosenberg was distributed, *all estate taxes had been paid.* (Tr. 3, par. V.) No additional tax was then contemplated but, to the contrary, it appeared that the estate was entitled to a refund. (Tr. 8-9, pars. XIII, XIV.) Under such circumstances, no lien rested on the property distributed to appellants or the gross estate of decedent under Section 409 of the 1921 Act,

because the tax had been paid. Any lien which might have then existed had been discharged. On June 5, 1925, *when said refund was made,* there was no lien on the property distributed to appellants, because the Commissioner determined that the estate taxes had not only been paid, but had been overpaid.

While the liability for estate tax rests on the Revenue Act of 1921 (because Isidore Rosenberg died while that Act was in force) *the collection of any deficiency in estate tax against his estate, or assertion of any transferees' liability against the distributees of his estate, rests entirely on the provisions of the 1926 Act,* because the alleged deficiency was determined by the Commissioner under that Act (Section 318 (a) Revenue Act of 1926), and the 1921 Act had been repealed as explained above. (See *U. S. v. Cruickshank,* 48 Fed. (2d) 352, 355.)

The Commissioner recognized that the Estate Tax provisions of the 1926 Act were applicable to this case when he determined a deficiency, mailed a notice of deficiency to the administrator, and delayed attempt to assess the deficiency against the administrator until after the decision of the Board of Tax Appeals on the appeal of said administrator became final. (Tr. 10-11, pars. XVI, XVII, XIX.) Had he the right to proceed under general law and a lien created by Section 409, why did he not exercise it without proceedings before the Board of Tax Appeals?

Appellee's position here is illogical as well as illegal. If Section 409 of the 1921 Act created such a forceful and enforcible lien as he contends, why did he

issue a sixty day letter or notice of deficiency to the administrator? If Section 409 was not enforcible against the administrator, how can it be enforcible against appellants as alleged transferees?

Where the Commissioner recognized the applicability of the 1926 Act against the taxpayer (as the law requires) he may not ignore the rights of distributees of an estate under Section 316 of that Act. He is no autocrat who may by his *ipse dixit* juggle with enactments and select the portions which he chooses to enforce and discard the remainder.

The Commissioner refused to proceed further under the Revenue Act of 1926, by determining "a liability, at law or in equity," against appellants and afford them the opportunity to defend themselves against assessment or distraint. (Tr. 14-21, pars. XXIII-XXX.) He has placed appellants in the position where, if they pay the alleged deficiency, they are paying *the tax* claimed against the estate and not a transferee liability. If they make payment, they are outsiders who make a voluntary payment and are denied any defense of their rights as transferees and, furthermore, are prohibited from suing for refund. This because Section 319 (a) of the Revenue Act of 1926 provides that, if the administrator appeals to the Board of Tax Appeals from a notice of deficiency sent him by the Commissioner, "*no refund* in respect to the tax *shall be allowed or made* and *no suit for the recovery of any part of such tax shall be instituted in any Court.*" (Italics supplied.)

This provision is so broad that it deprives appellants of any remedy to recover *the tax* if they should pay the money under the conditions now existing. Independent of the statutory interpretation presented, there are cases holding to the same effect without relying on Section 319 (a).

In *The Ohio Locomotive Crane Co. v. Nauts,* III [323] C. C. H. Federal Tax Service, 1932, p. 9179 (decided June 17, 1932) the U. S. District Court, N. D., Ohio, had before it two consolidated cases for refund. In both cases recovery was sought for income tax illegally assessed and collected. Additional taxes were assessed against the partnership at a time, which the government conceded, the statute of limitation had run against assessment and collection. The successor corporation, which bore the same name as the taxpayer partnership, which had been dissolved, received the notice of assessment and demand for payment. The corporation paid the tax and brought suit for refund. While the government admitted that it could not have collected the tax from anybody, due to the bar of limitation, it contended *that the payment by the corporation with full knowledge of all facts was a voluntary payment and could not be recovered by the corporation* even if it did not assume and was not liable for any income or property tax of the partnership. The Court sustained the contention of the government, citing cases to support its position. (See, *Security National Bank v. Young,* 55 Fed. (2d) 616, 619 and *Wourdock v. Becker,* 55 Fed. (2d) 840, 842.)

The position taken by the government in the foregoing cases is the opposite to that assumed in this case. The cases cited clearly show that, regardless of the provisions of Section 319(a) of the 1926 Act, the appellants herein would have no right to recover the tax assessed against the estate, if they paid it; and thus are without plain and adequate remedy at law. In this case the government is inconsistent not only in its attempt to evade the statute, but in reversing its heretofore assumed position before the Courts.

The alleged deficiency in tax against the Estate of Isidore Rosenberg was brought before the Board of Tax Appeals on a notice of deficiency addressed *only to the administrator.* Appellants had no right of appearance before the Board to defend themselves, because they could not inject themselves as parties to the proceeding when not named in the deficiency notice. (See, *A. L. Gump v. Commissioner,* 21 B. T. A, 606, 610.)

Section 316 of the Revenue Act of 1926 under which appellants were entitled to a hearing (which the Commissioner refuses to follow) provides as follows:

> "Sec. 316(a) The amounts of the following liabilities *shall* * * * be *assessed, collected* and *paid in the same manner* and subject to the same provisions and limitations *as in the case of a deficiency in a tax* imposed by this title (including the provisions in case of a delinquency in payment after notice and demand, the *provisions authorizing distraint* and proceedings in court for collection, *and the provisions prohibiting claims and suits for refunds*):

"(1) *The liability,* at law or in equity, *of a transferee of property of a decedent* or donor, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed by this title *or by any prior estate tax Act.*" * * * (Italics ours.)

* * * * * * *

"(e) As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee."

Any liability of appellants must be tested under this section for the word *"shall"* is mandatory.

Section 316 of the Act of 1926 was a new statutory provision which provided a new remedy for enforcing existing liability *against distributees* of an estate. For the procedure which the Commissioner must follow we turn to Section 308 of the 1926 Act which provides:

"308(a). If the Commissioner determines that there is a deficiency" (in this case a transferee's liability) "in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency" (liability) "to the executor" (transferees) "by registered mail. Within sixty days after such notice is mailed, * * * the executor" (transferees) "may file a petition with the Board of Tax Appeals for a redetermination of the deficiency" (liability). * * * *"No assessment* of a deficiency" (liability) "in respect to the tax imposed by this title *and no distraint or proceedings in court shall be made,* begun, or prosecuted *until such notice has been mailed."* * * * (Italics and parenthetical words supplied.)

The parenthetical words are supplied to demonstrate the inter-relation of Section 308(a) with Section 316.

Sections 308 and 316 (supra) show that the Commissioner may not proceed in this case against the appellants unless he proceeds against them, as transferees, *"in the same manner * * * as in the case of a deficiency"* provided in Section 308. His refusal to mail the notice of deficiency to appellants herein, as transferees (as demanded by them), has deprived them of the following privileges:

1. The right to pay the alleged tax as transferees and sue for refund otherwise prohibited by Section 319(a);

2. The right to contest their liability for the alleged tax;

3. The right to set up their defenses against the imposition;

4. The right to elect between (a) proceedings before the Board of Tax Appeals or (b) to pay the alleged liability and sue for refund;

5. Every legal right to defend themselves against sale of their property under the present distraint proceedings.

The Commissioner may neglect to issue a notice of deficiency to appellants as transferees, but, if he does so, he may not assess or collect any deficiency liability from them, or proceed by distraint against them. He is barred by Sections 308 and 316 of the 1926 Act in the absence of such a notice.

The report from the Conference Committee of the Senate and House on the 1926 Revenue Act discloses the legislative intent regarding Sections 316 and 308 of the Revenue Act of 1926 to be as we say. The report (page 50) states:

> "Sections 316 and 317 of the estate-tax title relate to the enforcement of liability of transferees or fiduciaries in respect of an unpaid estate or gift tax." * * * "In general the discussion under amendments Nos. 87 and 88 is applicable in explaining the effect of sections 316 and 317. Therefore a complete discussion is here omitted."

Amendment 87 above mentioned applies to transferees under the income tax title of the Act. Section 317 and Amendment 88 relate to fiduciaries and do not concern the present discussion. Amendment 87 relates to Section 280 of the 1926 Act (the income tax parallel to Section 316), which provides for proceedings against transferees in income tax cases, and the material part of the Conference Report regarding that section (pp. 43 and 44) reads as follows:

> "Without in any way changing the extent of such liability of the transferee under existing law" (i. e. suit in equity to recover), "the amendment *enforces such liability*" * * * "in the same manner as liability for a tax deficiency is enforced; that is, *notice by the commissioner to the transferee* and *opportunity either to pay and sue for refund* or else *to proceed before the Board of Tax Appeals,* with review by the courts." * * *
>
> "Section 274(a) (308 of Estate Tax provisions) *requires notice* of a deficiency in tax to be sent the taxpayer *before further proceedings* for the

collection of the tax liability are continued. The section, however, in terms *applies only to a deficiency in a tax* and does not apply to the liability of the transferee in respect of the tax of the taxpayer. Therefore, in proceedings against the transferee, notice need not be given the taxpayer under section 274(a). However, under the substitute agreed to by the conferees, the liability of the transferee is collected in the same manner as the liability for the tax. *Section 274(a) is thus incorporated by reference,* but *the result of such reference is that for procedural purposes the transferee is treated as a taxpayer* would be treated, and *under section (274a) notice would be sent to the transferee* (and not to the taxpayer) in proceedings to enforce the liability of the transferee." (Parentheses and italics supplied.)

If Section 316 is substituted for Section 280 and Section 308 substituted for Section 274 in reading the foregoing quotations, it at once becomes apparent that Congress intended that, under conditions like those in the instant case, a notice of liability must be sent to the transferees of an estate before the Commissioner can attempt in any other way to collect an alleged liability, and this regardless of all lien provisions. The Commissioner and appellee have failed to comply with the intent of Congress.

The quotation from the Report of the Conference Committee of the Senate and House (supra) shows the legislative intent regarding Sections 316 and 308 of the 1926 Act. It appears not only from the sections mentioned, but also from the Conference Report that a notice of liability against the transferees of an

estate *must* be sent to such transferees before any proceedings for assessment, collection or distraint shall be made, begun or prosecuted to collect the liability of transferees for a tax.

Section 308 of the 1926 Act shows the provisions and limitations regarding a deficiency. In copying the provisions of Section 308(a) quoted below we will substitute the words *"liability in respect of a tax"* for the word *"tax"* or the word *"deficiency,"* and the word *"transferee"* in place of the word *"executor"* in order that the applicable purport of the section may be appreciated:

> "Sec. 308(a). If the Commissioner determines that there is a liability in respect of a tax * * * the Commissioner is authorized to send notice of such liability by registered mail. Within 60 days after such notice is mailed * * * the transferee may file a petition with the Board of Tax Appeals." * * * *"no assessment* of a liability in respect of the tax imposed by this title and *no distraint* * * * for its collection *shall be made,* begun or prosecuted *until such notice has been mailed* to the transferee * * *. *Notwithstanding the provisions of section 3224* of the Revised Statutes *the making of such assessment* or the beginning of such proceedings *or distraint* during the time such *prohibition* is in force *may be enjoined* by a proceeding in the proper court." (Italics ours.)

We respectfully call the attention of the Court to *positive grant of a right of injunction* to transferees contained in the last two lines of above quotation, where the Commissioner attempts to assess or dis-

train without notice of liability mailed to the distributees of an estate, as in this case.

The Commissioner not only failed, but refused to send a notice of liability to appellants as transferees. (Tr. 14-21, pars. XXIII-XXX.) Section 316 contains the mandatory word "shall" which compels the Commissioner to follow the procedure stated in Section 308. While Section 308 provides that if there is a deficiency or liability *"the Commissioner is authorized"* to send notice of deficiency or liability, nevertheless the section is mandatory, for unless the deficiency notice is sent, *he may not* assess, *distrain* or commence proceedings in Court to collect the transferee liability. The Commissioner, therefore, is *prohibited* from assessment of the transferees' liability and appellee may not resort to distraint until such notice has been mailed and the transferees have elected and exhausted their opportunities for defense.

Under the admitted facts of this case, the Court *may not deny* injunction, for R. S. Section 3224 is rendered inoperative by Section 308 of the 1926 Act. Equity does not favor wanton disregard of the law nor support those who are disobedient when advised as to the requirements of the law.

In *O'Cedar Corp. v. Reinecke* (decided July 26, 1932, by the District Court, N. D. of Illinois E. D., III (323) C. C. H. Federal Tax Service, 1932, p. 9173), the Court had before it a case in which the Commissioner assessed a tax upon a deficiency determined by him without sending the notice of de-

ficiency to the taxpayer as required by the 1926 Act. The taxpayer paid the tax and filed claim for refund. The claim was denied and the taxpayer brought suit against the Collector to recover the deficiency paid. In a memorandum decision the Court said:

> "The whole case is rested upon the dereliction of the Commissioner in failing to give the *sixty-day notice*. After a study and consideration of the briefs on both sides, the court is of the opinion that the *method of injunctive relief provided* for by the Revenue Act of 1926 *should have been resorted to* in order that the matter might have been reviewed by the Board of Tax Appeals, if such was the desire of the plaintiff. *Not having resorted to the remedy provided by the statute,* the plaintiff is in no position to question the illegality of the assessment." (Italics ours.)

In other words, the Court holds entirely with our contention that as the Commissioner failed to issue the deficiency letter against appellants herein, they could have no right of recovery if they paid the alleged tax without the mailing of such a letter and that under the provisions of the 1926 Act *they must resort to injunctive relief* to protect themselves and force the Commissioner to issue a deficiency letter to them so that they may have a statutory remedy. This decision makes it mandatory upon appellants to resort to injunction in this case and is authority to this Court for granting appellants' prayer for relief.

See:

Peerless Woolen Mills v. Rose, 28 Fed. (2d) 661, 663.

5. APPELLANTS ARE ENTITLED TO INJUNCTION REGARDLESS OF R. S. SECTION 3224.

Appellee relies upon Revised Statutes, Section 3224 (26 U. S. C. A. Section 154), as his defense, which section reads as follows:

> "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

We consider Section 3224 R. S. only because the appellee rests upon it to evade Section 308 (a) of the 1926 Act. Section 3224 R. S. refers only to an original tax and not to deficiencies. Besides, the section is expressly made inapplicable to the present case by Section 308 of the Revenue Act of 1926.

The Courts have held that Section 3224 is not a barrier to injunction relief where there is no adequate remedy at law, or where exceptional and extraordinary conditions exist.

In the case of *Hill v. Wallace,* 259 U. S. 44, 62; 66 L. Ed. 822, 827, the Supreme Court was considering a case where the District Court of the United States for the Northern District of Illinois had dismissed a bill seeking injunction to prevent the collection of a tax under the Future Trading Act. There the Court said:

> "A further question arises as to whether this is a suit for an injunction against the collection of the tax, in violation of Sec. 3224, Rev. Stat. Comp. Stat. Sec. 5947, 3 Fed. Stat. Anno. 2d ed. p. 1032, in so far as it seeks relief against the district attorney and collector of internal revenue. Were this a state act, injunction would certainly issue against such officers, * * *. Does

> Sec. 3224, Rev. Stat. prevent the application of similar principles to a Federal taxing act? *It has been held by this court,* in Dodge v. Brady, 240 U. S. 122, 126, 60 L. Ed. 560, 562, 32 Sup. Ct. Rep. 277, *that Sec. 3224 of the Revised Statutes does not prevent an injunction* in a case apparently within its terms in which some extraordinary and exceptional circumstances make its provisions inapplicable." (Italics supplied.)

The decision goes on to discuss the particular facts of the case and then determines that *"the injunction* against the collector of internal revenue and the district attorney *should be granted."* (Italics supplied.)

In *Higgins Mfg. Co. v. Page, Collector, etc.,* 20 Fed. (2d) 948, the Court had before it a motion to dismiss a bill of complaint for an injunction to restrain the Collector of Internal Revenue for Rhode Island from collecting a tax, alleged to be due under an act of Congress relating to oleomargarine. The defendant relied upon R. S. Section 3224. The Court denied the motion to dismiss and granted injunction. After quoting the latter part of the foregoing citation from *Hill v. Wallace,* the Court said:

> "In this case *where there is no adequate remedy at law, the court should have power to grant relief;* otherwise, the citizen will be more at the mercy of the departments of the national government than is consistent with life in a free country." (Italics supplied.)

In *Acklin v. People's Sav. Ass'n.,* 293 Fed. 392, 394, the District Court, N. D. Ohio, W. D., had before it a motion to dismiss a complaint for injunction to re-

strain, among others, the Collector of Internal Revenue from assessing or collecting an income or capital stock tax under the Revenue Act of 1921. The Court denied the motion to dismiss and in doing so stated:

> "It is easily conceivable that there are and must be cases in which the rights and properties of a taxpayer will be utterly destroyed, if he is compelled to pay an alleged tax and pursue his remedy in the department, *wherefore, when the facts clearly show that the pursuit of the ordinary statutory remedy will inevitably result in such destruction, a court of equity may take jurisdiction to grant relief and to furnish an adequate remedy.*" (Italics supplied.)

The attention of the Court is directed to the fact that in the case above cited the plaintiff had a remedy (to pay the tax and pursue his remedy in the department), yet the injunction was granted. In this case the appellants have no remedy such as existed in the above cited case.

See:

Peerless Woolen Mills v. Rose, 28 Fed. (2d) 661, 663.

Livingston v. Becker, 40 Fed. (2d) 673, *674,* from which there has been no appeal, is a case which is similar in many respects to the case at bar, although it involved acts prior to that of 1926, so that Sections 316, 308 and 319 (a) are not applicable. There the trustee of an insolvent company paid out the debts due to the creditors of the company before he had any actual notice or knowlege, or even sufficient notice to put him on his inquiry concerning back taxes due

the United States. (A similar condition exists in this case.) After the assets of the company had been paid out to creditors, the Collector made demand on the trustee for payment of the tax. On duress of the threat to distrain against his personal property, the trustee paid the tax and then brought suit to recover on refund. (It will be noted that in that case the trustee was one in bankruptcy and that in this case, if appellants occupy any position of liability, they are trustees in equity.) The Court in discussing the remedies open to the trustee or plaintiff, in part, said:

> "The collector demanded this money out of the personal pocket of plaintiff and threatened distraint; under this threat plaintiff paid. *If it is not a tax against plaintiff, he could have sued defendant before he paid, to enjoin collection by distraint,* when distraint was threatened, and *in such action for an injunction,* the question of the unconstitutionality of collection by distraint, instead of by a plenary suit, might well have been raised.
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> "I think *there is nothing* in section 154, tit. 26 U. S. C. (26 U. S. C. A. sec. 154, *Revised Statutes, sec. 3224*), which forbids, or would have forbidden, *such injunction.* True it is that said section 154 (R. S. 3224) forbids the enjoining of either the assessment or the collection of a tax; *but it does not leave open to the collector the right to collect by distraint any obligation alleged to be due to the United States, by the mere expedient of calling the claim a tax,* when it is not such. (Lipke v. Lederer, 259 U. S. 557.)" (Italics supplied.)

In the foregoing case, as in this, no assessment was made against the plaintiff and the estate had been paid out before any liability was asserted by the Commissioner or Collector. There is greater reason for injunction in this case than that in the case cited above because a suit for refund is barred to appellants herein, if they pay, while in the case cited above no bar existed. (Section 319 (a), 1926 Act, *Bindley v. Heiner,* 38 Fed. (2d) 489, 490.)

In *Miller, Collector, etc. v. Standard Nut Margarine Co.,* 49 Fed. (2d) 79, 84 (affirmed, 52 S. Ct. 260), the Circuit Court of Appeals of the Fifth Circuit had before it an appeal from the District Court of the Southern District of Florida, which had granted permanent injunction restraining the Collector of Internal Revenue from collecting any tax from the appellee under the Oleomargarine Act of 1886. The Circuit Court of Appeals affirmed the decree of the lower Court and, in discussing the effects of Revised Statutes, Section 3224, 26 U. S. C. A., Section 154, said:

> "In several cases in which the Supreme Court of the United States had under consideration the above set out statute, forbidding the maintenance of any suit for the purpose of restraining the assessment or collection of any tax, *that court explicitly recognized that that statute does not prevent an injunction in a case apparently within its terms* in which some extraordinary and entirely exceptional circumstances make its provisions inapplicable. Hill v. Wallace, 259 U. S. 44, 62 S. Ct. 453, 66 L. Ed. 822; Bailey v. George, 259 U. S. 16, 42 S. Ct. 419, 66 L. Ed. 816; Dodge

v. Brady, 240 U. S. 122, 126, 36 S. Ct. 277, 60 L. Ed. 560." * * * "In view of that court's expressed conclusion, certainly *we would not be warranted* in attributing to that statute the meaning or effect of *preventing the interference by a court with the enforcement of an attempted exaction by a tax official* under the guise of an assessed tax, however extraordinary and exceptional the circumstances may be." (Italics supplied.)

In *Standard Nut Margarine Co. v. Rose, Collector, etc.,* 49 Fed. (2d) 85 (affirmed, 52 S. Ct. 260), was an appeal from the District Court for the Northern District of Georgia, where that Court had sustained a motion to dismiss a bill in equity for injunctive relief on the ground that Revised Statutes, Section 3224, prohibited such relief, the Circuit Court of Appeals, Fifth Circuit, reversed the decree of the District Court and the Supreme Court upheld the Circuit Court of Appeals.

In *Proctor & Gamble Distributing Co. v. Sherman,* 2 Fed. (2d) 165, which involved a prohibitory statute of the State of New York similar to Section 3224, U. S. Revised Statutes, the U. S. District Court held that: A statutory provision under which a taxpayer, on establishing the invalidity of a corporation tax after payment, may recover it back, but without interest, is not an adequate remedy sufficient to exclude jurisdiction in equity of a suit to enjoin the collection of the tax. Here again we find that there is a remedy, but because it was inaedquate the Court granted injunction.

The case of *Long v. Rasmussen, Collector, etc.,* 281 Fed. 236, 238, is one of peculiar application to this case. The issue involved the right of plaintiff to injunction restraining the defendant Collector from selling certain property owned by her under distraint proceedings to collect a tax assessed against another person. *Injunction was granted* and in its decision granting decree, the U. S. District Court, Montana, by Borquin, district judge, said:

> "Section 3224, R. S. (Comp. St. Sec. 5947), that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court' *applies to taxpayers only,* and who, thus deprived of one remedy, are given another by Section 3226, R. S. (Comp. St. Sec. 5949), viz., an action to recover after taxes paid and repayment denied by the Commissioner. Nor are they limited to this statutory remedy, but, after taxes paid, they may have trespass or other action against the collector." (Citing cases.)
>
> "The revenue laws are a code or system in regulation of tax assessment. *They relate to taxpayers and not to nontaxpayers. The latter are without their scope.* No procedure is prescribed for nontaxpayers, and *no attempt is made to annul any of their rights and remedies* in due course of law. With them Congress does not assume to deal, and *they are neither of the subject nor of the object of the revenue laws.* The instant suit is not to restrain assessment or collection of taxes of Wise, but is to enjoin trespass upon property of plaintiff, and *against whom no assessment has been made, and of whom no collection is sought.* Note, too, *the taxes are not assessed against the property.* This presents a

widely different case than that wherein the person assessed, seeks to restrain assessment or collection on the theory that he or it is exempt from taxation, or that for any reason the tax is illegal.'' (Italics supplied.)

The issues discussed in the above quotation which parallel those of this case are as follows: (1) Appellants herein are not the taxpayer, (2) no tax or liability for a tax has been assessed against them, (3) the assessment made against the taxpayer (Estate of Isidore Rosenberg, deceased), *was not* an assessment against property of any kind and, particularly, not against the property described in the bill of complaint, (4) Appellants have no procedure permitted or prescribed for recovery at law, (5) This suit is not to restrain the assessment or collection of taxes of said estate of Isidore Rosenberg, deceased, but is to enjoin damage to and trespass upon the property of appellants, (6) No warrant of distraint or notice of lien has ever been issued against appellants, yet appellee intends to possess and sell their property. While there are now provisions of law relating to transferees, which did not exist when the issue considered in *Long v. Rassmussen* arose, nevertheless the principles of the case are applicable—because no assessment was ever levied against the transferees.

The case of *Long v. Rassmussen* (supra) was cited with approval in *Trinicia Real Estate Co. v. Clarke, Collector, etc.*, 34 Fed. (2d) 325, 328, which was not appealed by the government. In that case the Court had before it a bill to enjoin sale of property under distraint proceedings. There Section 604 of

the Revenue Act of 1928 was involved. That section contains prohibitions similar to those in Section 3224, Revised Statutes, excepting that it applies only to determined transferees of a taxpayer and the assessment and collection of the amount of the liability of a transferee, at law or in equity. In the above mentioned case assessment was made against two of the four plaintiffs as alleged transferees under Section 280 of the Revenue Act of 1926. Distraint warrant was issued, and sale of property advertised thereunder, against the plaintiff as a transferee. The Court denied the defendant's motion to dismiss the bill and granted injunction *pendente lite,* citing with approval the doctrine announced in *Long v. Rassmussen* (supra), among other things, saying:

> "The collector *cannot with the sanction of law sell property under distraint proceedings for the purpose of collecting,* or attempting to collect, *an amount apparently never assessed as a tax."* (In this case an amount never assessed as a transferee's liability) "and seek protection under the limitations provided against interfering with an officer in the collection of a tax."
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> * * * * * * *
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> "It does not require many facts, under the circumstances of this case, to convince the court that this property, if sold at public sale, would be sold at a sacrifice." * * * "If the complainants' contention that the tax is illegal and erroneous is correct, it seems evident that, *if sold at a sacrifice, there would be irreparable injury* to complainants, or some of them, to the amount of the sacrifice. *Their remedy at law would only cover the sales price and interest."* (Italics supplied.)

The foregoing quotation is applicable to the instant case, because: (1) no assessment of liability under Section 316 of the Revenue Act of 1926 (the estate tax parallel of Section 280 of the same Act) has been made against appellants, or any of them; (2) there has been no determination of liability, at law or in equity, against appellants, or any of them, under Section 316 of the 1926 Act; (3) the sale of the property proposed would produce irreparable injury to appellants, due to the fact that they do not own complete title to the property proposed to be sold (Tr. 9, par. XV) and that at the present time, as this Court may take judicial notice of the present financial depression and lack of market, there is certain loss to be sustained if the property in question is sold; (4) the sale would produce the termination and liquidation of the partnership which now owns and operates the property.

While there are many cases which deny injunction under Section 3224, Revised Statutes, nevertheless *each* of said cases *discloses a situation* under which the plaintiffs *had a plain and adequate remedy at law.* Those cases are not applicable to the present case for the following reasons:

1. They do not consider Sections 308(a) and 316(a) of the Revenue Act of 1926;

2. Appellants are prevented from paying the tax assessed against decedent's estate and obtaining refund thereof (by claim or suit) because Section 319(a) of the Revenue Act of 1926 provides that "if the executor" * * * "files a petition

with the Board of Tax Appeals" * * * "*no refund* in respect of the tax *shall be allowed or made* and no suit for the recovery of any part of such tax *shall be instituted in any court.*" * * * (Italics supplied.) Any payment which appellants might now make would be a gratuitous payment of the alleged tax, and not of a transferee's liability, and so be beyond recovery. Also the prohibition of the section is all inclusive and does not confine its restrictions to the executor alone. (See *O'Cedar Corp. v. Reinecke* and *Ohio Locomotive Crane Co. v. Nauts,* supra IV-4, also *Peerless Woolen Mills v. Rose,* 28 Fed. (2d) 661, 663.)

3. The Commissioner evades the requirements of Sections 316(a), 318(a) and 308(a) of the Revenue Act of 1926 to determine that appellants are liable, "at law or in equity," for the deficiency which he seeks to recover. He thus deprives appellants of their right of appeal to the Board of Tax Appeals to have their liability adjudicated and, also, of a recognized status as transferees under which they might pay the tax and sue for refund. Appellee is proceeding to distrain though specifically prohibited by Section 308(a) of the 1926 Act from so doing.

4. The statutory provisions and the evasion thereof by appellee have left appellants in the position where they are deprived of all special statutory relief and also of a plain, speedy and adequate remedy at law.

Appellants are at the *mercy* of a department of the national government, as described in *Higgins Mfg. Co. v. Page* and *Miller v. Standard Nut Margarine Co.* (supra), and nothing they can now do will afford them adequate relief at law. Surely this situation is extraordinary and exceptional, and, it may be said, unconscionable.

In this regard a quotation from *Lafayette Worsted Co. v. Page,* 6 Fed. (2d) 399, 400, where the Collector had attempted to proceed by distraint to collect a tax in disregard of the taxpayer's right to a hearing before the Board of Tax Appeals and the Court granted injunction, is directly in point:

> "It can hardly be that the Commissioner is the sole and final judge of his own jurisdiction as between himself and an independent supervisory tribunal established by statute, *nor that he is at liberty to disregard explicit provisions of law curtailing his power.*" (Italics supplied.)

Under the facts before the Court in this case there is no question but that the Commissioner is attempting *"to disregard explicit provisions of law curtailing his power,"* viz.: Sections 316 and 308 of the Revenue Act of 1926, which grant a right to the appellants.

The regulations promulgated by the Treasury Department have laid down rules for the guidance of the Commissioner and the public, which are supposedly binding on the Commissioner and the appellee. Article 105 of Regulations 70, Subsection (4), relating to claims against transferred assets applies to Sections 316 and 308 and in its material part states:

"The amount for which a *transferee* of the property of a decedent is liable, at law or in equity * * * in respect of any estate tax imposed by Title III of the Revenue Act of 1926, *or by prior acts,* whether shown on the return of the executor or determined as a deficiency in the tax, shall be *assessed against such transferee* * * * and collected and paid in the *same manner* and subject to the same provisions and limitations *as in the case of a deficiency* imposed by Title III of the Revenue Act of 1926, * * *. The provisions relating to the payment of the tax and interest, the *authorization of distraint* and proceedings in court for collection, the *prohibition* of claims for abatement and *claims and suits for refund,* the *filing of a petition with the Board of Tax Appeals,* and *the filing of a petition for review* of the Board's decision, *are included in various sections and articles relating* to deficiencies in tax imposed by Title III." (Italics supplied.)

It will thus be seen that the Treasury Department has interpreted the Estate Tax Provisions of the Revenue Act of 1926 in a manner applicable to our contentions as follows:

1. The transferee provisions of the 1926 Act apply to all prior acts;

2. A transferee liability shall be assessed against the transferee in the same manner as a deficiency imposed by Section 308. (Here the Commissioner has violated the law and regulations because he has failed to determine any liability as required by Section 316 and he has sent

no notice of liability to the alleged transferees as required by Section 308, both of which sections are a part of Title III of the Revenue Act of 1926);

3. The regulation admits the provisions relating to distraint, which are prohibited by Section 308. (Yet the Commissioner is here attempting to enforce the prohibited distraint.)

4. The prohibition of suit for refund is admitted. (Although the appellee asserts that plaintiffs have a plain remedy at law.)

5. Recognition of the right to petition the Board of Tax Appeals for determination of the transferee liability is admitted. (Yet, on our request the Commissioner has refused to issue the notice which would entitle the appellants to file petition with the Board.)

6. All limitations to be found in Title III and relating to a deficiency (which would include Section 308) are admitted and by this admission *the Treasury Department confesses the right of appellants to injunction* to restrain assessment, collection, or distraint until after a liability is determined and notice thereof sent to the appellants.

It is a poor commentary on our tax collecting system when we find an administrative officer thereof not only violating the law but the regulations of his own department.

VI. THE UNUSUAL AND EXCEPTIONAL CONDITIONS WHICH ENTITLE APPELLANTS TO INJUNCTION, IF THE COURT GIVES ANY CONSIDERATION TO R. S. SECTION 3224.

Appellants assert their rights to injunction in this proceeding under Section 308(a) of the Revenue Act of 1926, which distinctly permits such relief regardless of Section 3224 R. S. for the reasons stated above, which may be summarized as follows:

1. The Commissioner of Internal Revenue has refused to comply with the statute (Section 316, Revenue Act of 1926) which requires him to treat transferee liabilities in the same manner as in the case of a deficiency in estate tax. (Tr. 15, 16; par. XXIV.)

2. The Commissioner has refused to send notice of any transferee liability to appellants for estate tax as required by Section 308, Revenue Act of 1926, or commence action in Court and give them opportunity to defend themselves against the burden sought to be imposed, which defense can be had in no other way under existing laws. (Tr. 19, 20, 21; pars. XXIX, XXX.)

3. Appellants are absolutely entitled to injunction under the provisions of 316 (a) and 308 (a) of the Revenue Act of 1926.

4. Appellants cannot pay the asserted tax found against the administrator and file claim and sue for refund of such amount, nor have an adequate remedy at law after so doing, because of the prohibition found in Section 319(a), Revenue Act of 1926 (Tr. 11, par. XVII), and because

they are without right of recovery if they make a voluntary payment of the amount demanded.

5. The asserted lien against the property of appellants is void.

6. The pending distraint proceedings are illegal and void and appellee has no authority thereunder to sell or otherwise dispose of or encumber the property of appellants thereunder.

7. Appellants are not taxpayers in this case and have not been determined to be or proceeded against as transferees.

8. Appellants will be deprived of their property and suffer irreparable injury and loss unless injunction is granted.

9. No assessment has been made against appellants for any purpose and no notice or demand for payment of a tax or a tax liability has been served on them by appellee.

10. No action at law or suit in equity has been brought against appellants to establish their liability at law or in equity or to give them any right of defense.

11. Appellee seeks to proceed against appellants in an unlawful and unauthorized manner, without authority at law and in violation of statutory provisions.

12. Appellee is seeking to sell by distraint *thirty* forty-eighths of the property described in the notice to appellants of his intention to sell under distraint, when as a matter of fact

each of the appellants received from the estate of Isidore Rosenberg but one-sixteenth, or a total of three-sixteenths (or nine forty-eighths) of the property so described. (Tr. 6, par. IX; Tr. 22, 23, par. XXXI.) He thus proposes to sell property which was never liable for any lien against the estate of Isidore Rosenberg, and thus commit an act in utter violation of the tax statute and Amendment V of the United States Constitution.

13. The injunction sought in this proceeding is to prevent appellee from the performance of an illegal act which is beyond the authority granted to him by any revenue statute, or recognized practice, or rule of law.

14. Appellants are specifically granted a right to injunction by Section 308 of the Revenue Act of 1926 which may not be ignored by this Court or evaded by appellee.

15. Appellants are without a plain, complete, or adequate remedy at law under the facts shown in the complaint, which pleaded facts are conceded to be true under appellee's motion to dismiss.

16. The circumstances disclosed by the bill of complaint herein are so extraordinary and exceptional (as well as illegal) that, despite the provisions of Section 3224, Revised Statutes, appellants are entitled to injunctive relief. (See Title IV-5, supra.)

VII. SUMMARY OF PROCEDURE TO BE FOLLOWED BY THE COMMISSIONER OF INTERNAL REVENUE AND THE APPELLEE BEFORE APPELLANTS' PROPERTY MAY BE LIENED OR SOLD UNDER DISTRAINT.

In order that the Court may readily appreciate our argument, we present the following schedule to show the procedure that should have been followed on the determination of a deficiency against the administrator, the discovery of no assets in the estate and the attempt to recover against the distributees and that which was followed. The omission to comply with the statutory procedure herein set forth shows the lack of power of appellee to sell the property of appellants on distraint warrant under present conditions and the necessity for injunctive relief.

Acts Required by Law to be Performed by Commissioner or Appellee	Provisions under 1926 Act or Revised Statutes	Acts Performed and Acts *Not* Performed
1. Determination of deficiency in tax against estate	Sec. 308(a)	Deficiency determined
2. Mailing of deficiency letter to executor or administrator	Sec. 308(a)	Letter mailed
3. Filing of petition with Board of Tax Appeals by the administrator, decision in favor of Commissioner and awaiting finality of decision	Sec. 308(a) Sec. 1005	All complied with
4. Assessment of tax against administrator	Sec. 308(b)	Assessment made
5. Assessment list forwarded by Commissioner to appellee	R. S. Sec. 3182	List forwarded

Acts Required by Law to be Performed by Commissioner or Appellee	Provisions under 1926 Act or Revised Statutes	Acts Performed and Acts *Not* Performed
6. Notice and demand made by appellee on administrator	R. S. Sec. 3184	Notice and demand given
7. Report by appellee to Commissioner that estate is without assets from which to collect taxes		Report probably made
8. Determination of liability for estate taxes against the appellants as transferees	Sec. 316(a)	*No* determination made
9. Mailing of notice of transferees liability to appellants after determination of liability	Sec. 308(a)	*No* notice of liability mailed
10. Opportunity afforded appellants to appeal to Board of Tax Appeals or pay liability and sue for refund	Sec. 308(a)	*No* such opportunity afforded because notice of deficiency was never mailed
11. Liability determined by Board of Tax Appeals when it becomes final shall be assessed and collected	Sec. 308(g) Sec. 308(b)	*No* liability determined by the Board and no assessment made against appellants
12. Lien arises when assessment list is received by Collector	R. S. 3182 R. S. 3186	*No* assessment list against appellants received by Collector
13. Notice and demand for payment to be made by Collector within ten days after receiving assessment list	R. S. 3184	*No* notice or demand given appellants
14. Distraint may be resorted to by Collector ten days after notice and demand is given	R. S. 3187 R. S. 3188	*No* distraint warrant ever issued against appellants

VIII. CONCLUSION.

We regret the length of this brief, but without guidance of a decision by the Court below to define specific issues for argument, we are forced to meet appellee's arguments in the Court below and to show the illegality of his threatened proceedings, and the fallacy of his contentions *in toto.*

Without doubt, appellants are entitled to injunction in this proceeding (1) because the statute (Sections 316 and 308 of the Revenue Act of 1926) grants that right, (2) because appellants are without remedy at law and (3) because the arbitrary and illegal actions which the appellee is directed to perform against appellants and the results thereof are extraordinary and exceptional to such a degree that Section 3224 R. S. constitutes no bar to injunction.

We respectfully ask that the judgment be reversed with directions to the Court below to enter judgment and injunction in accordance with the prayer found in the Bill for Injunction herein.

Dated, San Francisco,
December 14, 1932.

Respectfully submitted,

ADOLPHUS E. GRAUPNER,
Attorney for Appellants.

(Appendix Follows.)

Appendix.

Appendix

(Quoting applicable portions of tax and revenue statutes cited in brief.)

REVENUE ACT OF 1921.

Sec. 2:

"That when used in this Act—" * * * (9) "The term 'taxpayer' includes any person, trust or estate subject to a tax imposed by this Act;"

Sec. 406:

"That the *tax shall be due and payable one year after the decedent's death;* but in any case where the Commissioner finds that payment of the tax within such period would impose undue hardship upon the estate, he may grant an extension or extensions of time for payment not to exceed three years from the due date." * * *

Sec. 407:

"*That where the amount of tax shown upon a return made in good faith has been fully paid,* or time for payment has been extended, as provided in section 406, beyond one year and six months after the decedent's death, *and an additional amount of tax is,* after the expiration of such period of one year and six months, *found to be due, then such additional amount shall be paid upon notice and demand by the collector,* and if it remains unpaid for one month after such notice and demand there shall be added as part of the tax interest on such additional amount at the rate of 10 per centum per annum from the expiration of such period until paid, and such

additional tax and interest shall, until paid, be and remain a lien upon the entire gross estate." * * *

Sec. 408:

"*That if the tax herein imposed is not paid on or before the due date* thereof *the collector shall,* upon instruction from the Commissioner, *proceed to collect the tax under the provisions of general law, or commence appropriate proceedings* in any court of the United States, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto."

Sec. 409:

"That *unless the tax is sooner paid in full,* it shall be a lien for ten years *upon the gross estate of the decedent,* except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien." * * *

Revenue Act of 1924.

Sec. 1100 (a):

"The following parts of the Revenue Act of 1921 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment

of this Act, subject to the limitations provided in subdivisions (b) and (c):" * * *

"Title IV (called 'Estate Tax');"

Revenue Act of 1926.

Sec. 2 (a):

"When used in this Act—" * * * (9) "The term 'taxpayer' means any person subject to a tax imposed by this Act."

Sec. 308 (a):

"If the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the executor by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the executor may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 312 or 1001, *no assessment of a deficiency* in respect of the tax imposed by this title *and no distraint or proceeding in court* for its collection *shall be made, begun, or prosecuted until such notice has been mailed* to the executor, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. *Notwithstanding the provisions of section 3224 of Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may* be enjoined by a proceeding in the proper court."

Sec. 314 (a):

"If the tax herein imposed is not paid on or before the *due date* thereof the collector shall, upon instruction from the Commissioner, proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. *This subdivision in so far as it applies to the collection of a deficiency shall be subject to the provisions of section 308.*"

Sec. 315 (a):

"Unless the tax is sooner paid in full, it shall be a lien for ten years upon the *gross estate of the decedent,* except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien." * * *

Sec. 316 (a):

"The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limita-

tions as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a decedent or donor, in respect of the tax (including interest, additional amounts and additions to the tax provided by law) imposed by this title or by any prior estate tax Act or by any gift tax Act." * * *

Sec. 316 (e):

"As used in this section, the term 'transferee' includes heir, legatee, devisee, and distributee."

Sec. 318 (a):

"If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any estate or gift tax imposed by the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921," * * * "the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 308 of this Act. In the case of any such determination the amount which should be assessed" * * * "shall be computed as if this Act had not been enacted, but the amount so computed *shall be assessed, collected, and paid in the same manner* and subject to the same provisions

and limitations" * * * "*as in the case of a deficiency* in the tax imposed by this title," * * *.

Sec. 319 (a):

"If the Commissioner has mailed to the executor a notice of deficiency under subdivision (a) of section 308 and if the executor after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no refund in respect of the tax shall be allowed or made and no suit for the recovery of any part of such tax shall be instituted in any court—" * * *.

Sec. 1200 (a):

'The following parts of the Revenue Act of 1924 are repealed, to take effect" * * * "upon the enactment of this Act, subject to the limitations provided in subdivision (b):" * * *.

"Part I of Title III" * * *. Relating to Estate Taxes.

United States Revised Statutes.

Sec. 3184:

"*Notice and demand.* Where it is not otherwise provided, the collector shall in person or by deputy, within ten days after receiving any list of taxes from the Commissioner of Internal Revenue, give notice to each person liable to pay any taxes stated therein, to be left at his dwelling or usual place of business, or to be sent by mail, stating the amount of such taxes and demanding payment thereof. If such person does not pay the taxes, within ten days after the service or the sending by mail of such notice, it shall be the

duty of the collector or his deputy to collect the said taxes with a penalty of 5 per centum additional upon the amount of taxes, and interest at the rate of 1 per centum a month."

Sec. 3186:

"*Lien for taxes.* (a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, *belonging to such person.* Unless another date is specifically fixed by law, *the lien shall arise at the time the assessment list was received by the collector* and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time." * * *

Sec. 3213:

"*Suits for fines, penalties, and forfeitures, and taxes.* It shall be the duty of the collectors, in their respective districts, subject to the provisions of this title, to prosecute for the recovery of any sums which may be forfeited by law. All suits for fines, penalties, and forfeitures, where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, qui tam or otherwise, before any district court of the United States, for the district within which said fine, penalty, or forfeiture may have been incurred, or before any other court of competent jurisdiction; and taxes may be sued for

and recovered in the name of the United States, in any proper form of action, before any district court of the United States for the district within which the liability to such tax is incurred, or where the party from whom such tax is due resides at the time of the commencement of the said action. (R. S. Sec. 3213; Mar. 3, 1911, c. 231, Sec. 289, 36 Stat. 1167.)"

Sec. 3224:

"*Restraining assessments or collection of taxes.* No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

SECTIONS OF UNITED STATES CODE ANNOTATED, VOL. 26.

Sec. 104—See Section 3184 U. S. Revised Statutes (supra).

Sec. 115—See Section 3186 U. S. Revised Statutes (supra).

Sec. 142—See Section 3213 U. S. Revised Statutes (supra).

Sec. 154—See Section 3224 U. S. Revised Statutes (supra).

No. 6872

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDGAR D. ROSENBERG, HELEN ROSENBERG KAHN and CLAUDE N. ROSENBERG,
Appellants,

vs.

JOHN P. MCLAUGHLIN, Collector of Internal Revenue,
Appellee.

BRIEF FOR APPELLEE.

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JOHN P. McLAUGHLIN, Collector of Internal Revenue,
Appellee.

BRIEF FOR APPELLEE.

This is an appeal from a judgment of dismissal rendered by the United States District Court for the Northern District of California. A bill for injunction was filed by the appellants, Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg against John P. McLaughlin, Collector of Internal Revenue, for the First District of California, to restrain collection of the unpaid portion of a deficiency in an estate tax which had been determined by the Board of Tax Appeals against the Administrator of the Estate of Isadore Rosenberg, amounting to

$4787.60, together with interest. The appellee moved the court for an order dismissing the complaint for want of equity. The complaint and the motion were submitted on briefs. On May 25, 1932, the District Court granted defendant's motion to dismiss.

STATEMENT OF THE CASE.

The decedent, Isadore Rosenberg, a resident of California, died testate on May 23, 1923, leaving surviving him as beneficiaries of his estate his widow, Natalie Rosenberg, and three children, the appellants above-named. Under the will his estate passed one-half to the widow, and one-sixth to each of the children. The widow was appointed executrix of the estate. On December 31, 1923, she filed an estate tax return and paid the tax shown to be due on the return, namely, $7791.04. On March 24, 1924 she filed a claim for refund of estate taxes amounting to $5181.90 on the ground that the estate taxes in such amount had been erroneously collected. The estate of Isadore Rosenberg was distributed pursuant to the provisions of the will on July 10, 1924. The widow died on February 7, 1925. Under her will her estate passed in equal shares to the appellants to whom distribution was made in due course.

Edgar D. Rosenberg, one of the appellants herein, was appointed administrator of the estate of his father, Isadore Rosenberg, on April 6, 1925. This was for the purpose of collecting a refund of estate taxes in his father's estate, if such would be allowed by the Com-

missioner. In fact, on April 22, 1925, the Commissioner gave notice that a refund would be paid on the ground that the return of the gross estate of Isadore Rosenberg had included the widow's interest in the community property. On June 25, 1925, there was paid to him, as such administrator a refund of $4787.60. Under the terms of Isadore Rosenberg's will, the widow would have been entitled to one-half of this refund and the three children the remaining half, share and share alike. Under the mother's will the three children inherited share and share alike. As a result of the two wills the refund would, in fact, come to the appellants in equal shares.

On September 25, 1926, the Commissioner redetermined the tax due from the estate of Isadore Rosenberg and gave notice to Edgar D. Rosenberg of a deficiency estate tax amounting to $7839.07. Of this proposed deficiency, the sum of $4787.60 was on account of the refund which was alleged to have been paid erroneously, and the remainder $3051.47 was a deficiency arising out of other reasons. (Complaint par. 16, Rec. p. 10.) Following the notice of deficiency, the administrator, Edgar D. Rosenberg, appealed to the Board of Tax Appeals. The appeal was heard and on December 28, 1928, the Board entered a final decision in favor of the Commissioner for the amount of the proposed deficiency tax amounting to $7839.07. The decision of the Board of Tax Appeals is reported in

> *Appeal of Rosenberg,* 14 Bd. of Tax Appeals, 1340.

The deficiency so determined was assessed against Edgar D. Rosenberg, Administrator with the will annexed, of the Estate of Isadore Rosenberg, on July 27, 1929. He paid $3051.47, this amount representing the additional tax, leaving unpaid the balance of $4787.60, which represented the amount held by the Board to have been erroneously refunded by the Commissioner.

Upon the administrator's failure to pay the balance after notice and demand for payment, a warrant for distraint was issued and levy made upon certain real property located on Powell Street. Isadore Rosenberg, at the time of his death, owned a 3/8th interest in this property, which we will refer to as the "Powell Street property", described by metes and bounds in Paragraph IX of the complaint. (Rec. p. 5.) This 3/8ths interest was distributed, along with other property in Isadore Rosenberg's estate, on July 10, 1924, 3/16ths going to the widow, and 1/16th to each of the children. Following the death of the widow, Natalie Rosenberg, her 3/16th interest in this realty was distributed, 1/16th to each of the children. This was on July 27, 1925. Shortly prior to the distribution to them of their mother's interest, the three Rosenberg children, appellants herein, had purchased the outstanding undivided one-half interest of the Powell Street property which belonged to one Joseph Cahen, and on the same day sold a one-fourth undivided interest to one Langendorff. Thus, according to the allegations in the complaint, at the time the bill for injunction was filed, the appellants each owned a 1/16th

interest in the Powell Street property as heirs of their father and a 1/16th interest in the same property which came to them as heirs of their mother, but which came to her from the Estate of Isadore Rosenberg as his widow, the three together owning the amount originally owned by Isadore Rosenberg at the time of his death on May 31, 1923. In addition, they owned a one-fourth interest which represented the purchase from Joseph Cahen.

The Collector proposed to sell an interest in the Powell Street property on the theory that it was subject to a lien for estate taxes and thus to collect the unpaid balance of the deficiency in the estate taxes determined by the Board of Tax Appeals, amounting to $4787.60.

The question is, therefore, whether an injunction lay to restrain him from so proceeding.

In determining this question, it is necessary to consider what are the remedies which the government has in the collection of taxes generally. A general survey indicates that in times past the government has had two remedies: (1) where the original taxpayer has given away or distributed his property without payment of a tax due, or, in the case of a decedent, where property has been distributed to his heirs, then the government may proceed against the distributees in a proceeding in equity on the theory that the property constituted a trust fund for the creditors, of whom the government is one; and collection may be

made from the distributees, but only to the extent of the property in their hands. (2) By a claim of lien upon the property itself. Prior to the Revenue Act of 1926, a court proceeding was necessary to impose upon a transferee of assets the liability for taxes owed by the original taxpayer or by the estate of decedent. The old equitable remedy afforded by the creditors' bill enabled the government to collect taxes up to the extent of assets transferred to the individual defendant. However, the Revenue Act of 1926 enabled the Commissioner to assess taxes against a transferee. Section 280 of that Act provided for assessment of income taxes against the transferee of property of a taxpayer, and Section 316 (a) gave the same remedy as against the transferee of property of a decedent or a donor in respect to the tax imposed by the estate tax act or by any gift tax act.

As a consequence of the changes made in the 1926 Act, we contend that three remedies were available for the collection of the unpaid tax. *First,* by proceeding in equity against the distributees of the estate under the "trust fund" theory; *second,* by a lien upon the property of the original decedent, and *third,* by transferee proceedings brought by the Commissioner against the transferee of the estate. In the present case the second remedy was pursued.

The appellants herein take the position that Section 316 (a) made it mandatory upon the Commissioner to proceed against the transferees of a decedent's property, and that in the present case after

the determination of a deficiency against the administrator and the discovery of no assets in the estate, proceedings had to be brought under Section 316 (a) against the appellants as transferees. In other words, appellants contend that the transferee proceedings provided in Section 316 (a) of the Revenue Act of 1926 were exclusive in order to impose upon these appellants a liability for the estate taxes in question; and, secondly, that there was no lien against the property which was originally in their father's estate.

We shall discuss first, the exclusiveness of the remedy provided by Section 316 of the Revenue Act of 1926, and, secondly, the question whether there was a lien upon the Powell Street property for the estate taxes; third, whether the deficiency in question was a deficiency "in tax," secured by lien.

THE STATUTES INVOLVED.

Section 409 of the Revenue Act of 1921:

> "That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. * * *"

Section 315 of the Revenue Acts of 1924 and 1926:

> "Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the

decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. * * *"

Section 402 of the Revenue Act of 1921:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

"(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower; curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy; * * *".

Section 613 of the Revenue Act of 1928:

"(a) Section 3186 of the Revised Statutes, as amended, is amended to read as follows:

"'Sec. 3186. (a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the

United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

"(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector.' "

Section 3187 of the Revised Statutes as amended:

"If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with five per centum additional thereto, and interest as aforesaid, by distraint and sale, in the manner hereafter provided, of the goods, chattels, or effects, including stocks, securities, bank accounts and evidences of debt, of the person delinquent as aforesaid: * * *".

Section 3188 of the Revised Statutes:

"In such case of neglect or refusal, the collector may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property, except such as are exempt by the preceding section, belonging to such person, or on which the said lien exists, for the payment of the sum due as aforesaid, with interest and penalty for non-payment, and also of such further sum

as shall be sufficient for the fees, costs, and expenses of such levy."

Section 3224 of the Revised Statutes:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

Section 316 (a) (Revenue Act of 1926):

"The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a decedent or donor, in respect of the tax (including interest, additional amounts and additions to the tax provided by law) imposed by this title or by any prior estate tax Act or by any gift tax Act. * * *"

Section 308 (a) (Revenue Act of 1926):

"If the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the executor by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the executor may file a petition with the Board of Tax

Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 312 or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the executor, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

ARGUMENT.

I.

THE REVENUE ACT OF 1926 PROVIDED A NEW REMEDY IN ALLOWING PROCEEDINGS FOR THE ASSESSMENT OF TAXES TO BE BROUGHT AGAINST THE DISTRIBUTEES OF AN ESTATE, BUT SUCH REMEDY WAS CUMULATIVE, NOT EXCLUSIVE.

Section 316 of the Revenue Act of 1926, quoted above, enabled the Commissioner to assess against the transferee of property of a decedent estate taxes imposed by the Revenue Act of 1926, or by any prior estate tax act, or by any gift tax act. Appellants have failed to point out any provision in the 1926 Act which excludes the government from proceeding upon a lien, if there be a lien, under other statutory provi-

sions. They rely upon implications arising from the words

> "The amounts of the following liabilities *shall,* except as hereinafter in this section provided, be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in the tax imposed by this title."

It is stated that any liability of the appellants must be tested under this section for the word "shall" is mandatory (Appellant's Brief, pp. 26, 33, 57-58). Appellants urge that Section 316 was a new statutory provision which provided a new remedy for enforcing existing liability against the distributee of an estate, and that the Commissioner is obliged to follow the provisions of Section 316 combined with Section 308 of the Revenue Act of 1926, which provides the procedure for going before the Board of Tax Appeals (Appellant's Brief, pp. 33-34).

When it comes to the collection of taxes, a new remedy does not exclude the old remedy unless the statute expressly so provides.

> *Dollar Savings Bank v. United States,* 19 Wall. 227; 22 L. Ed. 80.

The argument that Section 316 is an exclusive remedy may be compared to a similar argument which has been made that Section 280 of the Revenue Act of 1926 was an exclusive remedy. Section 280 of the Revenue Act of 1926, in fact, follows the identical

language of Section 316 (a) except that it refers to "the liability at law or in equity of a transferee of property of a taxpayer," as to income tax; whereas Section 316 (a) refers to the liability of a transferee of property of a decedent or a donor in respect to estate taxes, or gift taxes. If Section 316 (a) is an exclusive remedy, and not a cumulative remedy, then, under the same reasoning, Section 280 would be held to be an exclusive remedy and not a cumulative remedy. Conversely, if Section 280 has been held to be not an exclusive remedy, then, under the same reasoning, Section 316 ought not to be held to be exclusive.

The argument that Section 280 was exclusive has been presented repeatedly, and almost uniformly the decision has been that the remedy is cumulative. See

> *U. S. v. Greenfield Tap & Die Corpn.*, 27 Fed. (2d) 933;
> *United States v. Garfunkel*, 52 Fed. (2d) 727;
> *United States v. Updike*, 32 Fed. (2d) 1;
> *Phillips v. Commissioner*, 282 U. S. 589;
> *United States v. Frommel & Bro.*, 50 Fed. (2d) 73.

Quite recently the question was presented to this court in the case of

> *John H. Leighton et al. v. United States*, 61 Fed. (2d) 530.

In that case the government sued the stockholders of the Leighton Corporation to whom assets had been distributed, without payment of income tax owed by

the corporation. The suit was brought against the stockholders, transferees, under the theory that the assets constituted a trust fund, for the payment of the taxes. Judgment was rendered against each stock holder to the extent of the distribution made to him. The appeal was grounded upon the contention that Section 280 of the Revenue Act of 1926 provided a new procedure for making liable for income taxes the transferees of the assets of a taxpayer; that this procedure was exclusive, and, by implication, took away the power of the District Court to entertain a creditors' bill, and that as the exclusive procedure brought by Section 280 had not been followed, the judgment was void. This court held that Section 280 was not an exclusive remedy but was cumulative and affirmed the judgment.

Following the analogy between Section 280 and Section 316 of the Revenue Act of 1926, the argument of the appellants falls to the ground. After the enactment of the Revenue Act of 1926, the United States had three remedies: *first,* to bring a suit in equity against the transferees of the estate on the theory that the property distributed to them constituted a trust fund for the payment of taxes due; *second,* by bringing transferee proceedings through the Commissioner against such transferees under the provisions of Section 316 (a), and, *third,* by pursuing a lien upon the property. In this case the United States elected to pursue the last remedy, to enforce a lien upon the property itself. Needless to say, if the Government

had a lien, then it was entitled to pursue it, even though it had remedies of a different kind.

II.

COLLECTION OF ESTATE TAXES MIGHT BE MADE BY PURSUING THE LIEN FOR TAXES WHICH ATTACHED UPON THE GROSS ESTATE OF THE DECEDENT AT THE TIME OF HIS DEATH.

(a) The lien was imposed by the Revenue Act of 1921.

The estate tax liability was imposed by the Revenue Act of 1921. Section 409 of that Act provides:

> "That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent."

In the case of

> *Page v. Skinner,* 298 Fed. 731, (C. C. A., 8th Cir.),

the decedent died on September 4, 1918. When the executrix filed the estate tax return on November 21, 1919, the Act of February 24, 1919, decreasing the schedule of rates, was in effect. The question was whether the later Act had repealed the prior Act without saving the tax, but, if the tax was saved, whether it was to be computed at the earlier or later rates. The case necessarily involved the time and character of the imposition of the tax. In holding that the tax was saved and accrued on the date of death the Court said:

> "The imposition took effect at the time of death and the tax became at once a lien on the property of the estate, enforceable by sale, if not paid, on proceedings in court. *N. Y. Trust Co. v. Eisner,* 256 U. S. 345; 65 L. Ed. 963. There was no personal liability. Shortly after the executrix made her return decedent's estate was closed and she brought this action in her personal right as sole beneficiary."

The appellants characterize the quoted passage as *obiter dictum.* If so it is dictum which has received unanimous approval and accord from other courts. In

> *United States v. Ayer,* 12 Fed. (2d) 194 (C. C. A. 1st Cir. at 199),

an action was brought against the executors of the estate of one Frederick Ayer. Ayer died on March 14, 1918. On September 8, 1919, his executors filed the return and paid the estate tax shown to be due on the return. On October 25, 1923, the Commissioner upon a review and audit determined that a further tax was due. Notice and demand was made for payment but the executors refused to pay. The United States sued for the additional tax. The Commissioner did not assess the tax within four years after the tax became due, and, in fact, never assessed it. The question was whether the United States might maintain an action against the executors either personally or in their representative capacity to recover the balance of the estate tax, the liability for which had accrued but the amount had not been assessed. In holding that the action lay, the court

commented upon the tax lien which the 1916 Revenue Act placed upon the gross estate, saying:

> "And it has been held that this lien for the tax attaches to the gross estate of the decedent from the time of his death, that is, simultaneously with the imposition of the tax. *Hertz v. Woodman,* 218 U. S. 205, 223; 54 L. Ed. 1001; *Page v. Skinner,* 298 Fed. 731 at 732."

Elsewhere in the opinion the court said:

> "We think the suit may be maintained and a personal judgment had against the executors for the amount of the tax due and that all the property of the estate that came into the hands of the executors and was not used to pay debts and expenses of administration, together with that transferred by the decedent in his lifetime in contemplation of death, upon *which a lien exists,* to secure payment of the tax, may be levied upon and sold to satisfy the judgment."

There are many later decisions which contain similar language.

Crooks v. Loose, 36 Fed. (2d) 571 at 573.

where the 1921 Revenue Act was involved.

O'Brien v. Sturgess, 39 Fed. (2d) 950, at 951;
Ewbank v. United States, 37 Fed. (2d) 383, at 385,

where the 1918 Revenue Act was in effect.

The appellants cite

United States v. Cruikshank, et al., 48 Fed. (2d) 352,

as standing for a different rule. In this case it appeared

that the decedent died on July 30, 1920. The executors filed the return on July 28, 1921, and paid a tax. On December 7, 1921, they filed an application under Section 407 of the 1921 Revenue Act for the Commissioner to make a final determination of tax liability and for discharge from their personal liability. The Commissioner did not determine a proposed deficiency assessment until April, 1925. During the interval, the executors had wound up the estate, paid the debts and turned over the net estate to the trustee named in the will. The United States sued for a judgment for the additional tax payable by the executors personally, and by the trustee out of the assets of the estate in his possession. This relief was granted. In referring to the lien the Court cited *Page v. Skinner,* supra, and also said:

> "If we lay to one side the asserted personal liability of the executors, the suit is solely to collect the tax through enforcement of the tax lien upon assets formerly belonging to the decedent. The trustee is a party defendant merely because these assets are now held by it. It is doubtless true that the restriction upon proceedings in court, which appears in section 308 (a), applies to a suit to collect a tax through enforcement of lien, as well as to other suits to collect taxes; in fact, section 314 (26 U. S. C. A. §1114), which authorizes proceedings in court of this character expressly declares that collection of a deficiency by this method shall be subject to the provisions of section 308 (a). But, as already pointed out, the requirements of section 308 (a) were fully complied with by the Commissioner. As I view the case, therefore, the claim that

the 1926 act forbade the bringing of this suit on July 22, 1926, is untenable."

Appellants cite *United States v. Cruikshank,* as authority for their contention that the United States could not rely on its lien for estate taxes, and that the Commissioner was obliged to bring transferee proceedings under Section 316 (a) and 308 of the 1926 Revenue Act. We are confident that the case stands for no such rule. In that case, as in the case at bar, the estate was wound up prior to the Commissioner's making of a deficiency assessment: there as here, the Commissioner gave the required notice of a proposed deficiency which enabled the executor or administrator to appeal to the Board of Tax Appeals. In neither case was notice given to the transferee of the estate. In that case, as in the present case, the Government sought to enforce its lien upon the assets in the hands of the transferee, without making the transferee personally liable. The difference is in the procedure for enforcing the lien. In *United States v. Cruikshank,* the remedy was by court action, in which the court ordered the assets to be sold to satisfy the lien; in the present case, the Collector sought to enforce the lien by distraint. The sole point on which the *Cruikshank* case supports appellants' contention is the court's view that in the suit in equity the transferee could not have been made personally liable for the tax to the extent of the property turned over to him—a view which is in direct opposition to the principles followed by this court in

Leighton v. United States, supra.

(b) Comparison of the specific lien for estate taxes and the general lien provided in Revised Statutes, Sec. 3186.

Upon the decedent's death on May 23, 1923, a lien was thus imposed upon his gross property and under the express language of the statute continued in effect for ten years unless the tax was "sooner paid in full". This lien is specifically an estate tax lien as distinguished from the general tax lien imposed by Section 3186 of the Revised Statutes, as amended, which is the tax lien applicable to all taxes. Section 3186 of the Revised Statutes, as amended (Section 613 of the Revenue Act of 1928), provides:

> "(a) If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector, and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.
>
> "(b) Such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice thereof has been filed by the collector. * * *"

Subsection (c) of Section 3186 of the Revised Statutes, further provides for the issuance by the collector of a certificate of release of lien upon the giv-

ing of a bond conditioned upon the payment of the assessment.

Subsection (f) provides that subsection (c) "shall apply to a lien in respect of any internal revenue tax, whether or not the lien is imposed by this section."

Section 3186 of the Revised Statutes, as amended, thus expressly recognizes the distinction which exists between the lien therein imposed and a lien imposed by other provisions of the law. The lien imposed by Section 3186 of the Revised Statutes, as amended, attaches only when the person liable to pay the taxes, neglects, or refuses to pay it after demand, and only from the time that the collector receives the assessment list. Thus, as conditions precedent to the attaching of a lien under Section 3186 of the Revised Statutes, as amended, there must be an assessment against the person liable to pay the tax, a demand for payment, and a neglect or refusal on his part to pay.

Now, comparing this section with the lien imposed by the estate tax provisions of the Revenue Act of 1921, and corresponding sections of other Revenue Acts, it will be seen that attachment of the tax lien requires none of these conditions, but automatically springs into existence upon the decedent's death (see *Page v. Skinner,* supra). Moreover the tax imposed by Section 3186 of the Revised Statutes, as amended, is upon property belonging to the person liable to pay the tax, whereas the lien imposed by the estate tax law is upon the gross estate of the decedent, which may

include property over which the executor, who is the person liable to pay the tax, has no custody or control. In short, the estate tax lien is a specific lien as distinguished from a general lien imposed by Section 3186 of the Revised Statutes, as amended. As a specific lien, it is peculiarly adapted to the collection of the estate tax. Under all the provisions of the federal statutes imposing an estate tax, the return is not required to be filed until a year after the decedent's death. If a lien for the estate tax attached only after assessment, notice and demand, and refusal to pay (as in the case of the lien imposed by Section 3186, R. S., as amended) it would be possible completely to defeat estate tax liability by the sale, mortgage or other disposition of the assets of the estate during the year elapsing between date of death and date of filing return.

Under Section 207 of the Revenue Act of 1916, the lien for an additional estate tax found to be due was expressly limited to that part of the gross estate which had not been sold to a bona fide purchaser for a fair consideration, in money or money's worth. A similar limitation was carried into Section 313 (c) of the 1926 Act in respect of a lien for a deficiency, saving that where the property was sold to a bona fide purchaser for value, the lien was shifted to the consideration received from such purchaser. This limitation in itself shows that otherwise property in the hands of a bona fide purchaser would have been regarded as subject to the estate tax lien. The extinction of the lien by

express statutory declaration in favor of a bona fide purchaser would have been unnecessary had the statute contemplated that the estate tax lien was subject to the requirements imposed by Section 3186, R. S., as amended.

In this connection let us note that while usually it is not necessary to resort to a provision for a general lien where a specific lien exists, nevertheless, the provision for a general lien can be resorted to.

> *Blacklock v. U. S.*, 208 U. S. 75, at p. 85; 52 L. Ed. 396; 16 Opns. Atty. Gen. 634, at p. 636.

(c) **The method of procedure by distraint.**

If a lien attaches, however, the method of procedure by distraint is the same, whether it be the general lien imposed by Section 3186, R. S., as amended, or by the estate tax provisions. This results from the operation of Section 1100 of the 1926 Act, and corresponding sections of the prior acts, which extend to and make a part of the 1926 Act the administrative provisions of earlier acts so far as applicable.

The method of procedure by distraint for the enforcement of the lien is prescribed by Sections 3187 and 3188 of the Revised Statutes, which are quoted above. Under these provisions the property which may be seized in the enforcement of a lien is either the property which belongs to the person liable to pay the tax, or the property upon which the lien exists. These provisions do not authorize the seizure of property in the enforcement of the lien where the prop-

erty at no time during the subsistence of the lien belonged to the person liable to pay the tax.

Mansfield v. Excelsior Refining Co., 133 U. S. 326; 34 L. Ed. 162.

But they do authorize such procedure where the property belonged to the delinquent at the time the lien attached, notwithstanding its sale thereafter prior to the seizure. Such in effect was the decision in the case of

Hartman v. Bean, 99 U. S. 393; 25 L. Ed. 455.

In this case there was a lien for tax on distilled spirits for the payment of which the distiller was liable. The lien was enforced by seizure of the spirits subsequent to the sale of the distillery. It appeared that the distilled spirits had been removed from the distillery without payment of tax for storage in a bonded warehouse where they were subsequently sold. Under the provisions of Section 3251 of the Revised Statutes, the tax on distilled spirits was required to be paid by the distiller, owner or person having possession thereof before removal from the distillery bonded warehouse, and was made a lien on the spirits. Subsequent to the sale of the spirits by the distiller, and while they remained in the warehouse, a deficiency assessment was made against the distiller based on the difference between the quantity of spirits produced and the quantity reported. Section 3309 of the Revised Statutes made the assessment a lien on all distilled spirits on the distillery premises. Upon the distiller's failure to pay the tax, the spirits in question, though no longer

the property of the distiller, were seized by the collector and sold to satisfy the assessment. The purchaser then instituted an action against the collector upon the ground that the spirits were not subject to a lien for the tax nor to seizure under the warrant of distraint. The Supreme Court sustained the validity of the lien and of the seizure and sale by the collector.

In the case of

> *Mansfield v. Excelsior Refining Co.,* 135 U. S. 326; 34 L. Ed. 162,

an action in ejectment was brought. Certain premises had been leased for distillery purposes, the owner agreeing that the premises should be liable to the lien imposed by Section 3251 of the Revised Statutes for the taxes on distilled spirits produced therein, and for which tax the distiller was liable. Upon the failure of the distiller to pay the tax assessed, the collector seized and sold the premises. Since the distiller had only a lease-hold interest in the premises, it was held that the fee did not pass, notwithstanding the lien thereon. The court pointed out that while the lien might have been enforced against the owner of the fee by a suit in equity, the distraint proceedings and the sale of the premises would affect only the interest of the person liable to pay the tax, in this case the lease-hold interest of the distiller.

In the case of

> *Blacklock v. United States,* 208 U. S. 75; 52 L. Ed. 396,

the court distinguished the *Mansfield* case. In the

Blacklock case certain distillery premises owned by the distiller were subject to the lien imposed by Section 3251 of the Revised Statutes, for the unpaid tax on distilled spirits. A mortgage was executed by the distiller subsequent to the accrual of the tax lien upon the spirits. The court held that the sale of the property under distraint proceedings passed the title to the purchaser free from the mortgage lien. It was stated that "the Government had the right, by distraint, to sell such interest in the lands as the delinquent distiller owned at the time its lien attached," and that "the interest which the distiller in this case had when the Government's lien attached passed by the sale of the collector".

The principle to be deduced from the decisions in these cases is that a tax lien on property may be enforced by seizure and sale under a warrant of distraint where, at the time the lien attached, the property belonged to the person liable to pay the tax.

These cases are also authority for the rule that the procedure for the enforcement of a tax lien other than a general lien imposed by Section 3186 of the Revised Statutes is the same procedure as that prescribed for the enforcement of the general lien. Therefore, such procedure is applicable to the lien imposed by the estate tax provisions. For estate tax purposes, the executor or administrator is the person liable to pay the tax. Since the estate tax lien attaches immediately upon the death of a decedent, the property at that time may be regarded as belonging to the taxpayer,

i. e. the administrator or executor, and therefore the property which is subject to seizure and sale under distraint proceedings is that property of the decedent which, after his death, constituted the assets of his estate.

III.

THE TAX SOUGHT TO BE RECOVERED IN THE CASE AT BAR BY LEVY UPON THE PROPERTY WAS A DEFICIENCY DETERMINED BY THE BOARD OF TAX APPEALS.

The appellants contend that part of the deficiency determined by the Board of Tax Appeals represented the amount erroneously refunded, $4748.60; that this deficiency is not a tax, and therefore there is no lien to protect it which is enforceable by the procedure of seizure and sale under warrant of distraint. In support of this contention, appellants cite authorities to the effect that when a tax is once paid the tax liability is satisfied and the lien discharged, and that where an amount so paid is subsequently refunded by the Commissioner erroneously, such refund may be recovered from the distributee of the refund by suit in court for money had and received, but not as a tax. Appellants cite the cases of

> *Kelly v. United States,* 30 Fed. (2d) 193;
> *Talcott v. United States,* 23 Fed. (2d) 897.

In the *Kelly* case, supra, decided by this court, it was held that the proper remedy for recovery by the United States of taxes erroneously refunded to a tax-

payer was by action at law for money had and received. In reaching this conclusion the court said:

> "It seems clear to us that the suit cannot be maintained on the theory on which it was commenced and prosecuted to final decree in the court below. When once paid a tax is gone, and a refund of the money does not restore it. 'If the owner or any other person entitled to make payment of the tax shall do so, the lien will not only be discharged absolutely, but all authority to proceed further against the property will be at an end.' Cooley on Taxation (3d Ed.) From this view, we know of no dissent. Thus in *Mason v. City of Chicago,* 48 Ill. 420, and *Hudson v. People,* 188 Ill. 103; 58 N. E. 964, it was held that the payment of a special assessment discharged the lien and that the lien could not be reinstated by a mere refund of the amount paid."

In the *Kelly* case, however, the amount of the erroneous refund had not been determined by a deficiency assessment. It is this difference which distinguishes those cases from the case at bar. In fact, this court has already distinguished the *Kelly* case upon this ground in

Levy v. Commissioner, 48 Fed. (2d) 725.

The facts in the *Levy* case up to a certain point are the same as in the instant case. The executor included the wife's share of the community property in the estate tax return, and paid the tax. Thereafter they filed a claim for refund. A refund was paid on the ground that the wife's share should have been ex-

cluded. Thereafter the Commissioner proposed a deficiency assessment by including the wife's share of the community property. The case went to the Board of Tax Appeals and thence to this court. It was argued in behalf of the executors that after they had paid the tax shown on the return and a refund had been made, then whether the refund was erroneous or not, no part of the refund could be considered as a "tax deficiency". The executors relied on the case of *United States v. Kelly*, supra, as do the appellants in the case at bar. The Commissioner relied upon the general principle that the Commissioner in reviewing, reconsidering and redetermining tax liability, may properly increase a deficiency by including the amount of erroneous abatements and refunds and upon the practice of the Board of Tax Appeals in so determining deficiencies.

This court held that the amount so erroneously refunded was properly included in a deficiency assessment, and distinguishing the *Kelly* case, said:

> "In *Kelly v. United States,* (C. C. A.) 30 F. (2d) 193, cited by the petitioners, the executrix paid the estate tax on the entire community estate, and a refund was made by the Commissioner because of a supposed error in including the entire community estate as a part of the net estate for tax purposes. Up to this point the two cases are analogous, but there the analogy ends. In the *Kelly* case the Commissioner did not redetermine the amount of the tax or deficiency, but contented himself by simply making a formal demand on the appellee

to pay the amount of the refund. Suit was thereupon instituted by the United States to recover the amount of the refund as a tax and to foreclose the tax lien. Under these facts, we held that the payment of the tax discharged the tax lien, that the refund of the tax did not restore it, and that the sole remedy of the government was an action at law against the executrix for money had and received. This was the only question determined. * * * In that case the government had an unquestionable right to recover the unauthorized refund in an action for money had and received, and whether the Commissioner had a concurrent right to redetermine a deficiency was not directly involved. * * *"

A similar decision appears in

Austin Co. v. Commissioner, 35 Fed. (2d) 910 (C. C. A. 6th Cir.).

No other conclusion is possible when one considers the statutory definition of a "deficiency," appearing in Section 307 of the Revenue Act of 1926, cited by the Court in the *Levy* case.

"The amount by which the tax imposed by this title exceeds the amount shown as the tax by the executor upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and *decreased by the amounts previously abated, refunded, or otherwise repaid* in respect of such tax; * * *". (Italics ours.)

Section 313 (b) provides the method whereby the executor may be discharged from personal liability for any deciency in tax, and subdivision (c) provides that "the provisions of subdivision (b) shall not operate as a release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due".

We conclude, therefore, that there is no basis for the contention in the case at bar that the deficiency determined by the Board of Tax Appeals, in so far as it related to the refund of $4787.60, was not a deficiency in tax.

IV.

A LIEN ATTACHED TO THE ESTATE PROPERTY FOR THE DEFICIENCY IN TAX, INCLUDING THE DEFICIENCY DETERMINED BY THE BOARD OF TAX APPEALS.

The estate tax lien imposed by Section 409 of the Revenue Act of 1921 attached upon the death of the decedent, Isadore Rosenberg. The language used in creating the lien is that

> "unless the tax is sooner paid in full it shall be a lien for ten years upon the gross estate of the decedent."

Appellants construe "sooner" to refer to the date when payment of the tax is due, and say that the whole provision means that the tax only becomes a lien on the gross estate at the time it becomes due and payable (i. e. one year after death) (Appellant's Brief, p. 10). Where the tax shown upon the estate tax re-

turn is paid before the "due" date, we presume that appellants would say no lien ever came into existence. We submit that this is strained. Suppose the case of an executor failing to return the true value of the estate, but nevertheless paying in advance of the "due" date the tax shown to be due on the erroneous or false return? Appellants' contention would require the decision that no lien ever came into existence under the 1921 Act, and that a subsequent assessment by the Commissioner would or would not be protected by lien, depending on the provisions of a later Act of Congress and whether the estate was distributed at the time of the deficiency assessment.

No authorities are cited by the appellants for this construction. The authority cited for holding that the due date for payment is the date of accrual of the estate tax is

> *Wilmington Trust Co. v. United States,* 28 Fed. (2d) 205; 207,
> (Appellants' Brief, page 23).

The court in the *Wilmington Trust Co.* case erred in its construction of the statute.

See

> *Hannah v. United States,* 68 Ct. Claims 45 (certiorari denied 280 U. S. 612),

and also

> *Burrows v. United States,* 56 Fed. (2d) 465, (Court of Claims),

where the authorities are fully cited.

A more natural meaning was given to Section 409 of the 1921 Act by taking "sooner" to refer to the lapse of the ten-year period referred to in Section 409; that is, that "the tax shall be a lien for ten years upon the gross estate of the decedent unless it is sooner (before the lapse of the ten-year period) paid *in full*".

This is the meaning followed by the court in

United States v. Ayer, 12 Fed. (2d) 194 at 199.

By the provision for a ten-year lien Congress must have intended to protect the estate taxes due the United States. Certainly the construction placed on Section 409 in *United States v. Ayer,* supra, would carry out the purpose of Congress better than the construction which appellants ask.

V.

THE RIGHT TO INJUNCTIVE RELIEF.

We shall not make elaborate argument upon this point. The appellants' bill for equitable relief is grounded upon the theory that the admitted facts showed that the Collector was attempting to enforce by warrant of distraint an alleged lien, which was completely void, for an alleged tax, which was not a tax.

We are inclined to agree with the views of the District Court in

Long v. Rasmussen, Collector, 281 Fed. 236.

cited in Appellants' Brief, at page 46.

We think it is true that section 3224 of the Revised Statutes prohibiting restraint of the assessment and collection of a tax relates to the protection of a tax and does not protect a collector's unauthorized trespass upon a plaintiff's property in which no tax is involved. On the other hand, if the facts alleged show that the Collector was seeking to enforce a statutory lien for a deficiency in tax properly assessed, appellants have not made out a case to support their prayer for injunctive relief. Section 3224 of the Revised Statutes, quoted at page 10 above, blocks them.

VI.

COMMENT ON MINOR POINTS.

There are other points touched upon in appellants' brief upon which we do not think extended argument is necessary. The appellants complain that they did not have opportunity to litigate the merits of the tax deficiency. The same complaint might be made in innumerable cases, where the executor or administrator appears and conducts the litigation in behalf of the heirs. The answer is that he is the person appointed by law for such purpose, and that the law gives the beneficiary a remedy in the case of a faithless administrator. We cannot agree that the beneficiaries or heirs should have the right to litigate the merits of a tax after the administrator has litigated it.

Before concluding our brief we would like to point out an apparent discrepancy which was not argued in

the lower court, and which appellants have not pressed, but which we think ought to be clarified. On referring to page 4 above, the Court will observe that the interest owned by Isadore Rosenberg in the Powell Street property was an undivided 3/8ths, which is now owned by the appellants in equal shares. By purchase, the appellants acquired an additional one-fourth interest. Each is now the owner of an undivided 10/48ths interest, of which only 6/48ths was originally in the estate of Isadore Rosenberg. Obviously, the lien for deficiency in tax does not apply to more than the original 3/8ths (or 18/48ths) owned by Isadore Rosenberg. The notice given each of the appellants by the Collector refers to a 10/48ths interest owned by each (Rec. pp. 22-23). We do not think that the notice can fairly be said to evince an intention to sell more than the original 3/8ths interest in Isadore Rosenberg's estate. The bill of complaint did not ask the court to protect the appellants as to the 4/48ths interest which each had acquired by purchase, nor did the Assignment of Errors assign error for a failure so to do. The appellant's brief makes some reference to this discrepancy (Appellants' Brief, p. 7).

Undoubtedly, the lower court would have protected the appellants as to the interest which they acquired by purchase, had appellants asked it, and had the pleadings necessitated it. In our opinion, the pleadings do not show an intention on the part of the Collector to levy upon more than the interest owned by

the decedent. He can only transfer to a prospective purchaser the property subject to the lien. We direct attention to the situation so that the court may give appellants protection if it is deemed to be needed.

Respectfully submitted,

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No. 6872

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

Edgar D. Rosenberg, Helen Rosenberg Kahn and Claude N. Rosenberg,

Appellants,

vs.

John P. McLaughlin, Collector of Internal Revenue for the First District of California,

Appellee.

REPLY BRIEF FOR APPELLANTS.

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No. 6872

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDGAR D. ROSENBERG, HELEN ROSENBERG KAHN and CLAUDE N. ROSENBERG, *Appellants,* vs. JOHN P. McLAUGHLIN, Collector of Internal Revenue for the First District of California, *Appellee.*	}

REPLY BRIEF FOR APPELLANTS.

The opening paragraph of appellee's brief is misleading. Appellants are not seeking "to restrain the collection of the unpaid portion of a deficiency in an estate tax which had been determined by the Board of Tax Appeals and assessed against the Administrator" of decedent's estate. They seek to enjoin something entirely different, viz.: the illegal sale of their property under distraint, when no determination has been made against them for any liability for any tax and no assessment for any tax liability has been made against them. Appellants are not administrators or taxpayers. They are outsiders to the tax assessed and

volunteers without right of recovery if they pay the tax. (Appellants' Brief, pp. 30-32.)

I. THE STATEMENT OF THE CASE.

In his statement of the case, appellee attempts to make much of the fact that the estate of Natalie Rosenberg, widow of Isidore Rosenberg, was distributed to appellants and that they thereby received her interest in the property subject to sale under distraint. What appellants received from the estate of Natalie Rosenberg is of no importance in this case, because appellee is moving against them only for their alleged liability for deficiency in tax against the estate of Isidore Rosenberg. No proceedings were ever taken against the estate of Natalie Rosenberg by the Commissioner and her estate admittedly overpaid the estate tax by $1,679.20, which the Commissioner refuses to refund because appellants were denying his right to arbitrarily seize and sell their property without determining any liability against them. If a continuing lien arose against the property of the estate of Isidore Rosenberg it would not affect property passing to appellants from the estate of Natalie Rosenberg, against which no deficiency in tax was ever determined. If appellants are liable as transferees, their liability is limited to what they received from the estate of their father.

II. ARGUMENT.

Appellee admits that, unless there is a lien which may be directly enforced by distraint against appellants' property, R. S. Section 3224 does not bar appellants from injunctive relief. (Appellee's Brief, pp. 33, 34.) Appellee's entire argument is devoted to attempting to maintain that a lien attached to the gross estate of Isidore Rosenberg at the date of his death and continued as a burden on the property of the estate after the tax was paid and the estate was distributed. We believe appellee's position to be unsound and entirely beyond the clear meaning of the statutes involved.

---

1. APPELLEE'S CLAIM OF A LIEN UNDER SECTION 409 OF THE 1921 ACT.

Appellee insists that the decision of *Page v. Skinner,* 298 Fed. 731, is authority for the imposition of an "all covering" lien upon the gross estate of a decedent at the instant of death and that such a lien is the one which is authorized by Section 409 of the 1921 Act. The decision in that case contained a brief statement upon which appellee relies, viz.:

> "The imposition took effect at the time of death and the tax became at once a lien on the property of the estate, enforceable by sale, if not paid, on proceedings in court."

We admit that when Isidore Rosenberg died in 1923, the estate became at once liable for a tax under the Revenue Act of 1921, which was then in force. We affirm that all other than the words "the imposition

took effect at the time of death'' contained in the quotation from *Page v. Skinner,* supra, is *obiter dictum,* contrary to direct statutory provisions, and therefore not law and contrary in effect to Section 409 of the 1921 Act. There was no lien involved in the case, no issue raised to cause the Court to consider a lien, and no statutory lien provision considered by the decision. The case involved an action to recover taxes paid and no lien could become an issue in such a case, nor could any words of the decision on an issue not before the Court become effective ordained law. We submit the following points for consideration:

(a) A Court may not legislate. Its decision may create a judgment lien against property of a party to a specific case, but such a decision cannot originate a fixed general lien law. It might create a precedent for other Courts to follow in specific cases, but a specific case would have to be presented before a Court and a judgment rendered against the person liable for a tax before a judgment lien could arise. No judgment against appellants has been rendered.

(b) No interpretation of Section 409 of the 1921 Act can be inferred from the decision of *Page v. Skinner* (supra), because neither that section nor the corresponding sections of any other estate tax statute were before the Court for any consideration.

(c) None of the Revenue Acts contain provisions for a lien on the gross estate of a decedent before the "due date" (one year after death). If an estate tax is paid on or before the due date,

no lien arises, unless at some subsequent time an additional tax or deficiency in tax is determined, and then the lien is a thing apart from the lien provided for the tax shown on the return. (Sec. 407, Act of 1921; Sec. 308 (b), Act of 1926; R. S. Sec. 3186; 26 U. S. C. A., Sec. 115.)

(d) Appellee's claim that a lien under Section 409 springs into existence automatically *at death* is contrary to the plain language of the section. His contention is based on a theory that Section 409 and the dictum of *Page v. Skinner,* conjointly create a lien law which permits liens to spring from thin air and contrary to express statutory provisions. The decision states that "imposition of the estate tax takes effect at the time of death, and the tax at once becomes a lien." In other words, at the moment of death the tax is a liability and, simultaneously, the lien arises. Section 409 provides "that unless the tax is *sooner* paid in full, it shall become a lien for ten years upon the gross estate of the decedent." To hold that the quoted language of Section 409 is conjunctive with the quoted language of *Page v. Skinner* (supra) would mean that a lien would be created before a tax liability could be ascertained, computed, or paid. If Congress so intended, why did it not so state in clear statutory language? No such intent of Congress can be deduced from the estate provisions of any revenue act. Assuredly the word "sooner" used in Section 409, applied to language to be found in the 1921 Act and not to something outside the

Act. It contemplated an opportunity to pay the estate tax shown on the return before a lien arose. That opportunity, under Section 406, is one year after death and not at the time of death. The tax could not be paid before death.

Let us now consider the cases appellee cites in support of his position that a lien attaches at death and within the contemplation of death. (Appellee's Brief, pp. 16-19.)

In *United States v. Ayer*, 12 Fed. (2d) 194, *the government brought suit before the Revenue Act of 1926 was passed* against the estate of Frederick Ayer (which was not distributed), through its executors, to recover the balance of a federal estate tax. Ayer died while the Revenue Act of 1916 was in force, but the 1918 Act having been passed shortly after death, the additional tax computed became enforceable under the terms of the latter Act. Action was not to enforce any lien, but to enforce payment of an addition to the tax returned under an Act which made no special provision for the treatment of a deficiency, as does the 1926 Act. No issue of a lien was before the Court, though, in commenting on the estate tax sections of the 1918 Act, the Court refers to the *obiter dictum* doctrine of *Page v. Skinner*, supra, and cites that case and *Hertz v. Woodman*, 218 U. S. 205, only after quoting from Section 409 and by way of comment stating "it has been held" that the lien attached at death. The statement was voluntary and not required, and made no law. *Page v. Skinner* involves the Revenue Acts of 1916 and 1918, while *Hertz v. Woodman*

involved the inheritance tax imposed by the war revenue act of 1898. The latter case does not declare the positive doctrine which *Page v. Skinner* attempts. However, the doctrine which the decision in *U. S. v. Ayer* seems to accept was later overruled by the United States Supreme Court in *U. S. v. Woodward,* 256 U. S. 632, 635, 65 L. Ed. 1131, 1135, and other cases cited in appellants' opening brief. (pp. 19-24.)

Reverting to consideration of *U. S. v. Ayer,* we cannot see how the case gives any weight to appellee's contention of a lien arising at the instant of death and continuing after the tax was paid to secure a possible additional tax, which might never be asserted. If such a lien, with such direct methods of recovery, existed, why did the government sue to recover the additional tax (such as is here involved) instead of resorting to distraint under the lien? The findings show no claim of lien but, to the contrary, disclose that the government sought to recover only by judgment in an action of contract. Why a circuitous route by way of the Courts, if the direct distraint procedure was so certain as appellee claims? Also, the case is directed against the estate and not against any distributees thereof. Moreover, the government resorted to one of the alternative remedies which appellee asserts and which we do not question. It will thus be seen that the case of *U. S. v. Ayer* has no application to appellants' contentions in this case.

In *Crooks v. Loose,* 36 Fed. (2d) 571, we find an action brought for the refund of a tax paid under the 1921 Act. Surely no lien could be involved in such an action, for no lien lies against the government. The

citation of *Page v. Skinner* regarding a lien had no place in the issues or the decision. The mere dictum of such a case has no weight.

Ewbank v. U. S., 37 Fed. (2d) 383, was an action at law by trustees under a will for a refund of taxes paid under the 1918 Act. The issue was whether an hiatus existed, due to the repeal of the 1918 Act and the enactment of the 1921 Act, which freed the estate from tax. Again no lien was at issue because the full tax had been paid and no lien could exist against the United States. The point for decision was when the estate became liable for the tax and the Court rightly held that the liability arose at the time of death. However, the reference to *Page v. Skinner* regarding the time of attachment of a lien could have no application to the issue decided and was *obiter dictum.*

In *O'Brien v. Sturgess,* 39 Fed. (2d) 950, we find another refund case brought by executors of an estate to recover taxes paid under the Revenue Act of 1918. We find the same issue as was raised in *Ewbank v. U. S.,* supra. The Court cites *Page v. Skinner,* but again we find the reference to a lien to be pure *obiter dictum* because no lien was involved or could be involved.

Both parties rely to some extent on the decision in *U. S. v. Cruickshank,* 48 Fed. (2d) 352. This was a suit in equity, to collect an additional tax owing to the United States under the Revenue Act of 1918, brought against the executors of an estate (in their fiduciary capacity and as individuals) and a trustee, to which the estate had been distributed. There was no lien at issue and the decision makes no reference to *Page v.*

Skinner or its *dictum*. Judgment was rendered against the executors and trustee in their fiduciary capacity. No personal liability was imposed on the executors nor was the trustee held liable as a transferee. The theory of the Court, though not clearly expressed, undoubtedly was that the estate had not been distributed in fact, but had been passed from the executors to the trustee for completion of the testamentary disposition. However, it will be noted that the deficiency sued upon was determined before the 1926 Revenue Act became effective and the decision clearly states that had the deficiency been disclosed after that Act became effective (as was the fact in this case) it would have been different on account of Section 308 (a) of the 1926 Act.

Leighton v. U. S., 61 Fed. (2d) 530, a case decided by this Court, lends no aid to appellee. No lien was at issue. The action was one brought to recover a tax deficiency from transferees. The decision states that "Warrants of distraint were issued against the corporation," the taxpayer "and returned unsatisfied". The same process that occurred in this case, but the government did not attempt to take the transferees' property by virtue of the warrants issued against the taxpayer, as it is attempting to do in this case. Instead it resorted to suit against the transferees to recover. Why did it do so, if the method of collection proposed against appellants is legal and arbitrarily so simple?

Not one of the cases above considered supports appellee in his contentions that the warrant of distraint issued against the estate can be effective in

distraining appellants' property, or that a lien exists on the property of the appellants for a deficiency determined after the estate was distributed and after the 1926 Act was in force.

Let us again examine the portion of the decision in *Page v. Skinner,* on which appellee relies, to see whether it applies to this case, as he contends. The language quoted (supra, Appellee's Brief, p. 16): "the tax became at once a lien on the property of the estate, enforceable by sale, if not paid, *on proceedings in court,*" leaves appellee far separated from his claims. Where are his proceedings in Court, under which he might enforce such a lien as he conjures by sale of appellants' property? Appellants have never been sued. How can distraint operate under this condition? In *U. S. v. Ayer,* supra, *U. S. v. Cruickshank,* supra, and *Leighton v. U. S.,* supra, we find the government bringing suits and not attempting to stretch the scope of distraint warrants to cover taxpayers and every suspected outsider.

Appellee complains that we show no direct authorities to support our contentions here. How can we, when the very cases cited by him show that the government usually resorted to suit and not to illegal distraint?

Let us now turn to the statutes to see what, if any, lien might arise on the determination of a deficiency after the distribution of the estate.

2. THE DEFICIENCY DETERMINED BY THE BOARD OF TAX APPEALS IS A LIABILITY DISTINCTIVE FROM THE TAX SHOWN BY THE RETURN AND A LIEN FOR A DEFICIENCY IS SOMETHING APART FROM A LIEN FOR THE TAX.

Section 407 of the 1921 Act distinguishes between the tax shown on the return and an "additional amount of tax" found after the time for payment of the tax shown upon the return. Section 407 is notable in that it provides for a specific lien for an "additional" tax on a different basis than the lien created for the tax shown upon the return. The lien under Section 409 of the 1921 Act is, therefore, a lien, only for the tax shown upon the return, while the lien imposed by Section 407 is something apart—dependent upon the contingency of the Commissioner finding an "additional amount of tax". No lien for the returned tax ever arose in this case because the tax was paid "sooner" than the due date. (*Kelley v. U. S.*, 30 Fed. (2d) 193.) No lien for the "additional" tax ever arose under Section 407, for no such addition was determined while the 1921 Act was in force or before the estate was distributed in 1925. (Tr. p. 4.) Lien statutes must be strictly construed. (Appellants' Opening Brief, pp. 14, 15, 21.) So Sections 407 and 409 cannot be fairly read and given a different interpretation than that above.

Appellee naively states (Brief, p. 33) that the word "sooner" as used in Section 409 refers to the lapse of the ten-year period of the lien provided therein. While we insist that no lien arose under Section 409 in this case, we cannot let such an absurd interpretation pass without comment. The section states: "That

unless the tax is sooner paid in full, it shall be a lien." Under this language there is but one interpretation. There must be a failure to pay the tax on the due date before a lien can arise. "Sooner" cannot refer back to a lien to be created only after a failure to pay a tax. Furthermore, *U. S. v. Ayer,* supra, contains no word in support of appellee's contention.

Section 306 of the 1926 Act provides: "As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax." This can have no other fair meaning than that after the return is filed, the Commissioner may have a reasonable time within which to audit the return and ascertain whether an additional tax is due. Certainly it should not mean that he may delay examination of the return indefinitely (three years in this case) and thereby delay distribution of an estate, or subject distributees to an unknown lien if distribution is made, when the Probate Court, the executor and the legatees are without notice of any government claim for additional taxes. (See, *Lindley v. U. S.,* 59 Fed. (2d) 336, 338, at pars. 1-4.) Congress has given no indication of such an intention.

Under Section 307 of the 1926 Act (the act in effect when the deficiency was found), all in excess of the tax returned becomes a "deficiency", as contradistinguished from the "tax" shown on the return. The Act treats the "tax" and the "deficiency" as distinctive things, as instanced by the fact that an executor has no right to appeal to the Board of Tax Appeals for any error in the "tax", while that right

is expressly granted for a "deficiency". An executor may pay the "tax" shown on the return years before the Commissioner examines the return and computes a "deficiency" as was the fact in this case. Thus, the differentiation between a "tax" and a "deficiency" is something necessary and warranted.

Section 314 (a) of the 1926 Act (the successor to Section 408 of the 1921 Act) provides that if the "tax" is not paid on or before the due date, it shall be collected under the provisions of general law or appropriate Court proceedings and then clearly distinguishes a "tax" from a "deficiency" by stating: "This subdivision in so far as it applies to the collection of a deficiency *shall* be subject to the provisions of Section 308." This provision, like Section 407 of the 1921 Act, marks a deficiency or additional tax as something different from the "tax shown upon a return". The returned tax may be collected under general law or through the Courts, but a deficiency can be fixed and collected only after compliance with Section 308 of the 1926 Act, and that Act contains no specific provisions for a lien for a "deficiency". Thus, every method of collection—assessment, lien, or distraint—is suspended until Section 308 permits the Commissioner to proceed. Should the Commissioner attempt to ignore Section 308 (a), he may be enjoined from collection under general law. Until his determination of a deficiency becomes definite under Section 308, he may not resort to assessment, lien, or distraint for collection. Such resort is then controlled by general law (R. S. Section 3186; 26 U. S. C. A., Section 115) under which no lien arises until the assessment list

is received by the Collector. When the Collector received the assessment list for the estate of Isidore Rosenberg, there was no estate whereon a lien might rest. (*U. S. v. Cruickshank,* 48 Fed. (2d) 352, 356, par. 4.)

Section 315 (a) of the 1926 Act (the counterpart of Section 409 of the 1921 Act) contains no provision for a lien for a "deficiency" and only refers to a lien for a "tax"; that is, the tax shown by the return. The proviso of that section, "Unless the tax is sooner paid in full", unmistakably refers to the "due date" mentioned in Section 314 (a), because no other "date" can be found in the Act. The "due date" has no application to a "deficiency", because the last sentence of Section 314 (a) expressly excludes it. Section 308 does not provide for any "date", when appeal is taken to the Board (as it was by the estate of Rosenberg), other than provided in Section 1005 of the 1926 Act, which are far different from the "due date" fixed by Section 314 (a) for the tax shown on the return.

If a lien under Section 315 (a) could arise against the estate of Rosenberg for the deficiency it would be limited, by the words "unless sooner paid in full", to the date the decision of the Board became final under Section 1005 (a) (1), that is six months after the decision of the Board was rendered on January 16, 1929. (Section 308 (g).) Then the estate was but a name, its assets having been distributed long before.

A comparison of the first paragraph of Section 407 of the 1921 Act with Section 314 (a) of the 1926 Act

distinctly shows that the liens created by Sections 409 of the 1921 Act and 315 (a) of the 1926 Act were never intended to apply to an "additional tax" or a "deficiency" and that the payment of the tax shown on the return discharged any lien therefor, as was held in *Kelley v. U. S.*, 30 Fed. (2d) 193. Therefore, if any lien existed under appellee's interpretation of Section 409 of the 1921 Act and *Page v. Skinner* (supra), it was erased by payment. No additional tax having been determined before distribution, the assets of the estate passed to appellants, as distributees, without lien.

Furthermore, Section 318 (a) of the 1926 Act shows that the only estate tax lien created by the 1926 Act (Section 315 (a)) does not create a lien for a "deficiency". The section provides:

> "If * * * the Commissioner determines that any assessment should be made in respect of any estate or gift tax imposed by * * * *the Revenue Act of 1921,* the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall for the purposes of this Act, be considered a notice under subdivision (a) of section 308 of this Act."

In other words, the tax added to that which was returned in 1921 becomes a "deficiency" when, as in this case, it was determined after the 1926 Act became effective. This section becomes mandatory in so far as a lien for a "deficiency" is concerned, because, for the purpose of determining a "deficiency", the last sentence of Section 314 (a) uses the words: "Shall be

subject to the provisions of section 308." Also, because Section 308 (a) deprives the Commissioner of the right to assess, collect or distrain for a "deficiency" until notice thereof has been mailed to the person against whom the deficiency has been determined, and then not until the determination has become final.

The estate tax provisions of the 1921 Act were repealed. Under Section 318 (a) of the 1926 Act, the Commissioner's only right under the 1921 Act in determining a "deficiency" against the Rosenberg estate, was to compute the amount at the rate prescribed in the 1921 Act. (*U. S. v. Cruickshank,* 48 Fed. (2d) 352, 356.)

A study of all the sections of the 1921 and 1926 Acts discussed above is convincing that, where a "deficiency" is determined, under the 1926 Act the Commissioner must resort to Section 308 and fully comply with its requirements before he can assess, lien, or distrain the property of the estate for a "deficiency". He complied with Section 308 (a) with respect to the estate herein involved. After the decision of the Board of Tax Appeals had become final, he attempted to proceed, in accordance with Section 308 (b) and the general law mentioned in Section 314 (a), to assess against and collect the "deficiency" from the barren estate. He could not collect from the estate because no estate remained; warrant of distraint against the estate could only be enforced against property in the estate, and there was none.

To further demonstrate that the "tax" mentioned in Section 409 of the 1921 Act and in Section 315 (a)

of the 1926 Act are to be distinguished from a "deficiency", we call attention to Section 904 of the 1926 Act which confers jurisdiction on the Board of Tax Appeals. For determination of matters relating to estate taxes its jurisdiction is restricted by Sections 308 and 316 to the determination of "deficiencies" and the liabilities of transferees and fiduciaries. No jurisdiction over the "tax" shown on the return is conferred on the Board. The return tax is a confessed liability, which must be paid within one year after death or subject the estate to a lien under Section 315 (a) of the 1926 Act. But no lien for a "deficiency" can arise until Section 308 is fully complied with (Section 314 (a)), because the Commissioner's determination is not binding on the taxpayer, or complete or enforceable, but remains entirely tentative until, under one of the two contingencies provided in that section, the determination becomes ratified and enforceable. The determination by the Commissioner is uncertain as to amount and enforceability until a final determination under Section 308 makes a proposed liability something definite. Congress expressed no intention to create a certain lien on an uncertain liability. Section 308 (a) withheld from the Commissioner all right to enforce his uncertain determination of a "deficiency" and granted right to enjoin him if he varied from the course prescribed. (*U. S. v. Cruickshank,* 48 Fed. (2d) 352, 357.)

The deficiency herein involved was assessed July 27, 1929 (Tr. p. 4), and the assessment list therefor was received by the appellee about August 14, 1929 (Tr. pp. 11, 12), more than five years after the estate was

distributed. How could a lien then arise against the estate? Section 308 of the 1926 Act, under which the Commissioner and the administrator submitted the deficiency issue of the estate to the Board of Tax Appeals, contains no provision for a lien. However, the language of subsections (b), (c) and (h) of Section 308 indicates that assessment and collection shall be in the same manner as provided in R. S. Section 3182 (26 U. S. C. A., Section 102) which, with R. S. Sections 3184 and 3186 (26 U. S. C. A., Sections 104 and 115) constitute the general law provisions where there is no specific statutory provision creating a lien, as in this case of deficiency.

Certainly no lien could be imposed against any property not in the estate when the deficiency determination became final and assessment was made, nor could warrant of distraint issued under the assessment become effective against the estate or any one else, because the estate had long been barren. The decision of the Board of Tax Appeals could warrant no lien or distraint against any property not within the estate, because the "deficiency notice" was directed only to the estate (Tr. p. 11) and the decision was against only the estate. (*Rosenberg v. Commissioner,* 14 B. T. A. 1340.) Under that decision, which was binding on the Commissioner, assessment, lien and warrant of distraint could be directed only against the estate and affect only property remaining therein.

When the appellee and the Commissioner found the estate of Rosenberg destitute of property to lien or distrain, their resources to create a lien were exhausted unless resort was had to Section 316 of the

1926 Act to proceed against the transferees and thereby obtain a lien and opportunity to distrain. The Commissioner ignored Section 316, but this Court may not overlook it in considering the question as to whether a valid lien has arisen against appellants' property.

Section 316 of the 1926 Act is important in determining whether a lien exists against appellants as transferees. We will not discuss it from the standpoint of appellee. (See Appellee's Brief, pp. 11-15.) Appellee contends that he had three remedies: (1) a suit in equity, (2) transferee proceedings under Section 316, and (3) by pursuing a lien upon the property. His first remedy, if the right exists, has not been invoked. He has refused to resort to his second remedy. His third remedy does not exist, because we have shown that no lien ever could attach to the property of appellants under the statutes. If appellee desires a lien he must, by the mandatory provisions of Section 316, proceed in accordance with that section and Section 308. If he does not so proceed he may make no assessment of the deficiency or transferee liability nor distrain or proceed in Court for collection. Section 316 (a) clearly provides that transferee liabilities *shall* be subject to the same restrictions as provided in the case of a deficiency. (See Section 308.) Therefore, no lien for a transferee liability can be obtained except after compliance with Section 316. We are not here arguing about remedies available to the government, but are insisting that the attachment of a lien is distinct from remedies for the recovery of a transferee's liability.

Appellee seems to deny any application of the lien provisions of R. S. Section 3186. (26 U. S. C. A., Section 115.) As the warrant of distraint shows on its face that it was issued pursuant to that section, appellee's position seems peculiar. We believe we have shown that the only lien that could arise on a deficiency is one under the section, because the Revenue Act of 1926 creates no specific lien for a deficiency.

The foregoing detailed analysis of the statutes has been made to demonstrate that neither under the 1921 Act or the 1926 Act any lien rested on the gross estate of Isidore Rosenberg which would encumber the property distributed to appellants. Also, if no lien rested on the property when distributed, none of the subsequent proceedings against the estate created a lien on the property which appellants received. If no lien encumbered appellants' property, appellee admits that they are entitled to the relief prayed for. (Appellee's Brief, p. 34.)

In this regard we desire to call the Court's attention to the latest decision relating to distraint against transferees upon warrant issued against the taxpayer. An income tax was assessed against the Wyoming Coal Co. and distraint warrant was issued against that company. With that warrant a deputy collector sought to levy against the bank account of the Lion Coal Co., transferee of the Wyoming Co. Farr, an officer in both companies, was present when the deputy collector undertook to levy on the bank account, and taking a cashier's check on the Lion Company's account for the amount of the tax and interest, he

delivered it to the deputy collector. The U. S. Circuit Court of Appeals for the Tenth Circuit in *The Lion Coal Co. v. Anderson,* III (323) C. C. H. Federal Tax Service (1932), pp. 9488, 9490 (decided December 15, 1932), said:

> "Prior to the enactment of Sec. 280" (the income tax parallel of Section 316), "Revenue Act, 1926 (44 Stat. 61), *a tax liability could only be enforced against a transferee* of the taxpayer's property *by a suit in equity or an action at law* (Phillips v. Commissioner, 283 U. S. 589), and *property of such a transferee could not be lawfully subjected to a distraint for taxes assessed against the transferor.*
>
> It follows that *the bank account of the Lion Company could not be lawfully subjected to the distraint and levy.* Was it so subjected? *Distraint is regulated by statute.* No sale can be made for a period of ten days after the levy. Sections 117-19, Title 26, U. S. C. A. Such a procedure was not carried out. Instead, when the deputy collector undertook to levy upon the bank account, the bank's officer prepared a cashier's check and delivered it to Farr, an officer of the Lion Company, who then gave it to the deputy collector. Farr protested solely on the ground that the tax of the Wyoming Company was being collected for the wrong year.
>
> We think the effect of the transaction was not the unlawful subjection of the bank account to a distraint, but a payment made under protest by the Lion Company. The Lion Company instead of paying the tax, *could have enjoined the distraint and sale of its bank account for such tax.* Sec. 3224, R. S., providing that 'no suit for the

purpose of restraining the assessment or collection of any tax shall be maintained in any court,' *would not have inhibited such an injunction. The injunction would not have been against the collection of a tax, but against the enforcement by distraint of a legal or equitable liability of a transferee* of the taxpayer's property." (Italics and parenthesis supplied.)

The case cited deals with a payment made before the enactment of the 1926 Act. However, it conclusively holds that a distraint warrant issued against a taxpayer cannot be utilized to distrain and levy against the property of a transferee and, also, that despite the provisions of Section 3224, R. S., injunction could issue to enjoin distraint of a transferee's property under a warrant issued against the taxpayer. *This is exactly the position which we assert.* The case cited is in accord with the cases cited on pages 40-49 of appellants' opening brief.

If the Court gives any consideration to a lien existing under Section 409 of the Revenue Act of 1921, then the foregoing decision would be directly applicable to the contentions of appellants. They are not attempting to enjoin the collection of a tax, but are seeking to enjoin the enforcement by distraint of a legal or equitable liability of transferees. The Section 280 referred to in the decision is the income tax parallel to the estate tax provision regarding transferees found in Section 316 of the 1926 Act.

3. THE REMEDIES CLAIMED BY APPELLEE DO NOT CREATE THE LIEN HEREIN CONTESTED.

Appellee is apparently confused over our reliance on Section 316 and reference to the remedies available to the government. (See Appellee's Brief, pp. 11-15.) The remedies for collection by the government are not at issue here, except in so far as the action of appellee in this case is concerned. The government might have sued appellants under the "equitable trust" doctrine, but it did not do so. Such a suit would not be premised on a lien. The government might have proceeded against appellants under Section 316 of the 1926 Act, but it refused to do so. It then claims a third remedy: "pursuing a lien upon the property." This remedy is important in this case only because it involves the question of a lien, under which distraint may be exercised.

It is our contention that the third remedy is entirely barred. First, because no lien is available to warrant distraint and, second, because Sections 316 and 308 prohibit the utilization of such a remedy. The first reason has been amply discussed in the preceding section of our argument.

Section 316, relating to distributees of an estate as transferees, distinctly states that the liability of a transferee *shall* "be assessed, *collected* and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax * * * (including * * * the provisions authorizing distraint * * *)." This provision requires reliance upon Section 308 for procedure and limitation. That section makes no provision of any kind for a lien for

a deficiency and, consequently, none for a transferee liability. But it does say that "*no distraint* or proceeding in court" shall be begun until notice of determination is sent and, if appeal is taken to the Board of Tax Appeals, not until its decision becomes final. Sections 316 and 308 therefore prohibit distraint against a transferee until the decision of the Board has become final. After the decision becomes final a lien may arise under R. S. Section 3186 (26 U. S. C. A., Section 115) under which appellee might distrain. However, this background for his present attempt to distrain is absolutely lacking. The prohibition on "collection" until Sections 316 and 308 have been complied with is, of itself, a prohibition on distraint, for distraint is but a method of "collection". But, in addition to prohibiting collection, the sections prohibit "distraint". Thus, the remedy appellee seeks to assert against appellants is not available or legal until the Commissioner complies with the sections mentioned. (See *Lion Coal Co. v. Anderson,* supra.)

We wish it understood that we are not here urging that Section 316 is an exclusive remedy, as appellee seems to understand to be our position. We do contend, however, that as the government has failed to comply with the available primary remedies, the remedy sought to be used in this case is premature and unavailable under Sections 316 and 308 of the 1926 Act.

4. THE CASE OF KELLEY v. UNITED STATES.

In his brief (pp. 27-31) appellee seeks to show that *Kelley v. U. S.,* 30 Fed. (2d) 193, is no authority for any of our contentions in this case. Before discussing the case it may be well to point out that appellee misconceives our position regarding the deficiency at issue herein. We do not contend in this case that the deficiency is separable into two parts—one an additional tax and the other a refund added thereto. And we do not rely upon *Kelley v. U. S.* to support any such contention. We admit that the government had a remedy to recover an erroneous refund. We rely on that case as authority for our claim that no lien was imposed on the property of the estate of Isidore Rosenberg by Section 409 of the 1921 Act.

In the *Kelley* case, the government brought suit in equity to enforce a *lien* under Section 409 of the 1918 Act (which is identical with Section 409 of the 1921 Act) for the amount of a refund erroneously paid, as a part of the estate tax. That case is parallel to the one at bar on the following points: (1) The estate tax shown on the returns in each case was paid before the "due date" prescribed in Sections 406 of the 1918 and 1921 Acts; (2) long after the estate tax was paid, refunds were allowed in both cases; (3) the Commissioner asserted a lien to exist under Section 409 of the 1918 Act in the *Kelley* case and, in this case, asserted a lien for a deficiency under Section 409 of the 1921 Act after the estate had been distributed and the 1921 Act had been repealed. Up to the time the refunds were made and until they were determined to have

been erroneously paid, the status of the two estates was the same.

When the deficiency was determined under the 1926 Act against the estate of Isidore Rosenberg it was, as we have shown in subsection 2 of this argument, something apart from the tax contemplated by Section 409 of the 1921 Act. The deficiency was not determined until after the estate was distributed, but appellee insists that it, and the amount of the erroneous refund included in it, constituted a part of or recreated a lien under Section 409 of the 1921 Act. We therefore believe that the decision of this Court in the *Kelley* case destroys appellee's claim. And, it should be remembered, that case is the only one considering a lien under Section 409 (which is the same in both the 1918 and 1921 Acts).

This Court, in deciding the *Kelley* case, considered whether the government could proceed in equity to enforce a lien under Section 409 and held that it could not, because no lien existed, saying:

> "When once paid, a tax is gone, and a refund of the money does not restore it. 'If the owner or any other person entitled to make payment of the tax shall do so, the *lien will not only be discharged absolutely, but all authority to proceed further against the property will be at an end.*' " (Italics supplied.)

We maintain that this is conclusive as to the correctness of our position. At the time the erroneous refund was found in this case, all taxes had been paid and there was no lien on the estate. The finding of that error in 1929 could not, under the foregoing

quotation, restore the lien any more than it could in the *Kelley* case—the 1921 Act has been repealed and revival of a lien thereunder was impossible. The determination of the deficiency was entirely a result of the erroneous refund. The determination that the refund was erroneous resulted in an increase of the amount of the estate tax so that a deficiency could be found. A deficiency being found the erroneous refund was added to it. Had the administrator immediately paid the tax deficiency, no method of recovery of the erroneous refund would have remained to the Collector but to sue in law as this Court required in the *Kelley* case. Thus, we see that the decision in the *Kelley* case is decisive of the lien issue in this case.

Our conclusion is based upon arguments already detailed in subdivision 2, supra. The lien under the 1921 Act was discharged by payment and the only lien upon which appellee relies is one which he insists was maintained as a result of that Act. A lien against the estate under the 1926 Act would be a lien against nothing, for the estate was fully distributed before that Act went into effect. The tax under the 1921 Act was paid while that Act was in force, and under the facts related, none could arise under that Act.

Appellee cites *Levy v. Commissioner,* 48 Fed. (2d) 725, to oppose our interpretation of the Kelley decision. We see nothing in that case to minimize the direct declaration of this Court in the *Kelley* case nor to affect our claim that the Kelley ruling is applicable here.

In the *Levy* case the estate does not appear to have been distributed when the deficiency was determined, here it was. In that case the executors were the appellants to this Court from the Board of Tax Appeals decision upholding the determination of the Commissioner, a different situation from that appearing in the *Kelley* case. In the *Levy* case, no question of the existence or continuance of a lien arose, while in the *Kelley* case the non-existence of a lien was the real issue upon which this Court remanded the case to the lower Court. In the *Levy* case the Court failed to give any attention to Section 315 (a) which provides that unless the tax is paid "sooner" than the "due date" fixed in Section 314 (a) it shall become a lien, nor the exclusion of a "deficiency" from lien, collection or distraint found in Section 314 (a). There is nothing in Section 407 of the 1921 Act to warrant a holding that a lien which did not arise while the 1921 Act was in force could retroactively be put in force by the determination of a deficiency and thus create a lien under Section 409 of the 1921 Act long after that Act had been repealed. Sections 318 (a) and 308 of the 1926 Act absolutely preclude such an interpretation. A statute is not retroactive unless specifically so declared in the statute and there is no provision for retroactive revival of estate tax liens in the 1926 Act. The Revenue Act of 1921 was repealed and the treatment of any deficiency in a tax which accrued under that Act must be under the provisions of the 1926 Act. (See, Section 318 (a).) Such treatment means that if any lien is created it must be under the Act of 1926.

5. PROCEDURE BY DISTRAINT.

On pages 23 and 24 of his brief, appellee states that procedure by distraint may be utilized only when there is a lien on property belonging to the person liable to pay the tax or on property which has passed into other hands while the lien exists. We can admit this statement without grant of any comfort to appellee.

When the deficiency against the estate of Isidore Rosenberg was determined, so that a lien might have arisen, there was no property in the estate (the person liable for the tax) upon which a lien could rest or against which distraint warrant might issue. Appellants did not take property burdened by lien from the estate, so no lien rests on their property nor can it be distrained legally.

However, we find appellee's discussion of procedure on distraint deeply silent on the procedure attempted here. Where is his authority for distraint against the property of appellants on a warrant addressed to someone else? A warrant is a process which operates only against the person (in this case the estate) named therein. (Appellants' Opening Brief, p. 15.) No warrant of distraint directed to the estate may operate against appellants' property, as transferees. (*Lion Coal Co. v. Anderson*, supra.)

Appellee's procedure on distraint is entirely illegal because (1) there was nothing in the estate to which a lien could attach when the deficiency, which might have created a lien, was determined, (2) the distraint warrant, under which appellee seeks to sell appellants' property, is directed to an estate and not to appellants,

and (3) appellants have in no way been held to be liable as transferees.

III. COMMENT ON MISCELLANEOUS POINTS.

(a) We have set forth our reasons for right to injunction in this case at some length in appellants' opening brief. (pp. 27-56.) Appellee has failed to disclose any good reason in his reply brief to show why injunction should be denied, but, to the contrary, has admitted (Appellee's Brief, pp. 33, 34) that we are *not* barred from injunctive relief by the provisions of R. S. Section 3224. (26 U. S. C. A., Section 154.) This admission should assure us the relief sought. We direct the Court's specific attention to the paragraph at the top of page 34 of appellee's brief. As we read it, after the admission found on page 33, appellee tacitly admits that in this case his proposed actions, which we seek to enjoin, would be an unauthorized trespass upon appellants' property. This would seem to warrant no other action by this Court than to reverse the decision of the Court below and direct that injunction issue.

(b) Appellee states that he can see no reason why the beneficiaries or heirs should have the right to litigate the merits of a tax after the administrator has litigated it. (Appellee's Brief, p. 34.) This is rather an astounding statement. The rights of transferees are independent from those of an executor and may be adverse. The statute provides a procedure for their protection, and for appellee to argue to the contrary in the face of so many Court decisions seems to be a

futile grasp at a straw in a last endeavor to save a losing case.

(c) On pages 31 and 32 of his brief, appellee seems to misunderstand our views as to the application of the word "sooner", as used in Section 409 of the 1921 Act, to the "due date" as used in Sections 406 and 408. We believe that we had been definite in explaining our meaning in our opening brief and believe we have made it clear in subdivision 2 of our argument (supra). However, we do not desire the Court to mistake our explanation. While the 1921 Act was in force no lien for estate tax could arise until the "due date", defined in Sections 406 and 408, had arrived. If the tax was not paid "sooner" than that "due date" it at once became a lien on that date, whether or not a return was filed. If a return was filed and the tax shown thereon was fully paid "sooner" than the due date, no lien would arise if the return was made in good faith. And we might inject here that lack of good faith has never been charged against the Rosenberg return. If, during the time the 1921 Act was in force, the tax shown on the return was paid within the specified time and an "additional tax" was found to be due as provided in Section 407 a lien of a different character would arise for such "additional tax". The liens provided in the two sections are different, both in their creation and their life. That under Section 409 is for ten years from the "due date", while that in Section 407 does not arise until one month after notice and demand for its payment has been made and continues indefinitely until paid. It is this distinction which discharged the lien under

Section 409 when the tax was paid and would have permitted another lien to arise if an "additional tax" had been found while the 1921 Act was in force. There is sound reason for the distinction between "returned tax" and "deficiency" in estate taxes. The vast majority of estate taxes are returned correctly and paid. Deficiencies arise infrequently and usually are found long after the returned tax has been paid and at a time estates are ready for distribution. The lien for the returned tax is provided in order to enforce a prompt payment of that tax and avoid delay of distribution. By returning a tax the executors have confessed its correctness. With respect to a deficiency it may be said that its determination is not to be expected to such a degree as to warrant a lien therefor before its determination and the date it becomes final. Even when it is determined by the Commissioner, it is not final or certain, as is a returned tax. Therefore a separate lien for a "deficiency" meets reason and permits executors to distribute and be freed from liability. (See *Lindley v. U. S.,* 59 Fed. (2d) 336, 338.) So we assert that appellee's claim of a continuing lien under Section 409 is untenable. No "additional tax" being found against the Rosenberg estate during the life of the 1921 Act or before the estate was distributed, there could be no lien on the property when it passed to appellants on distribution.

IV. CONCLUSION.

In considering this case we would have the Court fully appreciate that we are not contending that any

revenue statute is illegal. Injunction is sought to restrain appellee from violating the provisions of the revenue acts involved and the administrative officers from resorting to illegal methods, interpretation, and procedure. We ask that these administrative officers be bound to conform to the powers granted them and do not exceed them.

Furthermore, this is not a proceeding to enjoin the collection of a tax. Appellants are not taxpayers, no assessment of a tax liability has been made against them, and no assertion or determination of any liability has been made against them as required by statute. They are strangers and outsiders to the operation of the Revenue Acts and appellee has made them so by his actions. (See, *The Lion Coal Co. v. Anderson*, supra.)

The brief of appellee does not establish his case. He admits his failure to comply with the applicable statutes (Sections 316 (a) and 308 (a) of the Revenue Act of 1926), he also admits that appellants may not pay the tax and recover as provided in Section 319 (a) of the 1926 Act, and he further admits that appellants are *not* barred from injunction by R. S. Section 3224.

Appellants respectfully contend that the judgment of the lower Court should be reversed and injunction granted as prayed for.

Dated, San Francisco,
February 6, 1933.

ADOLPHUS E. GRAUPNER,
Attorney for Appellants.

No. 6872

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDGAR D. ROSENBERG, HELEN ROSENBERG KAHN and CLAUDE N. ROSENBERG,

Appellants,

vs.

JOHN V. LEWIS, Collector of Internal Revenue for the First District of California, substituted as the party appellee in place of John P. McLaughlin, formerly Collector of Internal Revenue for said District,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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Appellee.

APPELLANTS' PETITION FOR A REHEARING.

To the Honorable Curtis D. Wilbur, Presiding Judge, the Honorable William H. Sawtelle, Associate Judge, and Honorable Francis A. Garrecht, Associate Judge, Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellants request a rehearing in this case because they believe that this Court has fallen into grievous error regarding certain propositions of law upon which it bases its decision and, in addition, has misapprehended and not thoroughly considered the facts essential to a correct decision.

STATEMENT.

In making this petition appellants are not challenging that portion of the decision which holds that the Collector was not restricted by Sections 316 (a) and 308 (a) of the Revenue Act of 1926 to the determination of the liability of appellants as transferees, although we believe the decision in error on that point and reserve the right to challenge the decision on that issue if it becomes necessary to appeal.

This petition is specifically directed to that part of the decision which denies appellants' injunctive relief under the facts alleged in the bill of complaint, which holds that Section 409 of the Revenue Act of 1921 provides a definite and continuing lien against property which was once a part of the estate of Isidore Rosenberg, regardless of the fact that the estate tax shown on the return was duly paid before the due date therefor, and no additional tax was found until long after the estate had been distributed, which entirely ignores the statutory provisions of the Revenue Acts of 1924 and 1926 which supersede the provisions of the Revenue Act of 1921, and which denies injunction against the Collector, where his actions are tacitly admitted to be in error by appellee and are ignored by the Court in its decision.

Furthermore, this petition is filed in order that this Court may have the opportunity of correcting what we believe to be serious errors and unsound conclusions made in its decision, rather than to seek review by the Supreme Court.

GROUNDS FOR REHEARING.

1. The decision rendered provides a lien for estate taxes that is novel and unsupported by the authorities relied upon by appellee and by the Court and therefore deserves a most thorough reconsideration by the Court. The decision declares principles of general application and of great public importance, because it subjects all distributees of estates to possible loss of their property by seizure and sale without due process under the concealed and unascertainable liens which the decision warrants or creates. Even the title of purchasers of property for value from distributees is placed in danger by the decision. Such a lien as the decision declares to exist is not a matter of record, is not affected by payment of the tax shown on the return or subsequently determined, and apparently requires no notice of lien to be filed by the Collector, regardless of the fact that an estate has been distributed. Such a lien may be protracted to the limit of the ten year period declared by the Court through failure of the Commissioner to determine any additional tax. The extended continuance of such an indefinite lien as the decision declares will work unwarranted hardship on distributees, by rendering it difficult to sell, mortgage or pledge their properties, because the lien is not provided by any statute in force, it is not required that the liability of distributees as transferees be determined, and seizure and sale seems to be warranted against any person owning the property at the time the Collector acts within the ten year period upon the Commissioner's unreviewable declaration that more tax than that paid is due from the estate.

2. The question stated by the Court on page 3 of its printed decision as the only remaining question to be solved, viz.: "Is there a valid and subsisting lien upon the property enforceable by distraint?", discloses a complete misunderstanding of the issue presented in the bill of complaint. The issue upon which the injunction was sought is: *May the Collector seize and sell the property belonging to appellants under the proceedings complained of, when no tax liability has been determined against them and the Commissioner has refused to take the necessary statutory steps to determine whether they are liable?* (See Appellants' Brief, pp. 5, 6; Appellants' Reply Brief, p. 1.) Furthermore, after erroneously stating the issue, the decision says: "It is conceded that if such a lien attached to the property it arose under Section 409 of the Revenue Act of 1921." *This is a mistake.* (See Appellants' Reply Brief, pp. 3 to 6.) Appellants never conceded that Section 409 of the Revenue Act of 1921 had any application to the additional tax determined by the Board of Tax Appeals, the assessment of the deficiency by the Commissioner, the demand made on the administrator, the issuance of the warrant of distraint, or the attempt to levy upon the property of appellants. To the contrary appellants have insisted that the Collector had no authority to do anything under Section 409 (supra). A correct decision can never be made upon an incorrect conception of issues, facts, or law.

3. That part of the decision of this Court on which rehearing is sought is founded upon a non-existent

issue and a concession which was never made, and therefore is wholly erroneous in its conclusions.

4. By denial of the injunction sought by the appellants; by ignoring the fact that the Commissioner of Internal Revenue elected to proceed under Section 308 (a) of the Revenue Act of 1926 and determined a deficiency thereunder and thereon caused assessment, demand for payment, and issuance of warrant of distraint to be made against the administrator of the estate of Isidore Rosenberg, deceased; by ignoring the distinction between "the tax" as shown by the return and the "additional tax" or "deficiency" provided in the Revenue Acts of 1921, 1924 and 1926; by ignoring the fact that the "deficiency" determined by the Commissioner, which affords the real issue in this case, consisted partially of an additional tax and partly of an erroneous refund; by ignoring the fact that the Revenue Act of 1921 contains no provision for recovering an erroneous refund or treating it as a tax and by ignoring all of the estate tax provisions of the Revenue Acts of 1924 and 1926, this Court has determined a lien to exist which is not provided for in any statute and which is contrary to law. (See Appellants' Reply Brief, pp. 11-22.)

5. The decision is legislative in character in that it provides a lien without regard to specific applicable statutes and of uncertain character which the Collector may enforce against appellants by seizure and sale, without restriction of prohibitive statutes and without regard to the fact that appellants are not taxpayers and have never been determined to be liable

for any tax or deficiency due from the estate of Isidore Rosenberg, deceased.

6. The decision in this case in effect annuls the decision of the Board of Tax Appeals in *Rosenberg v. Commissioner,* 14 B. T. A. 1340, under which the Commissioner made the assessment and the Collector issued the warrant of distraint, the enforcement of which is the cause for filing the bill of injunction in this case, in the following particulars:

(a) The decision ignores the fact that the proceeding before the Board was brought under the only statutory provision open to the Commissioner (Sections 307 and 308 of the 1926 Act, which are the comparative sections to Section 407 of the 1921 Act) for any assessment, collection or distraint on account of an additional tax.

(b) By holding that there is a method of enforcement by distraint under the Revenue Act of 1921 or Sections 3187 and 3188, U. S. Revised Statutes, of a tax deficiency determined after the 1926 Act became effective, other than by compliance with Section 308 (a) of the 1926 Act.

(c) By holding that Section 409 of the 1921 Act or R. S. Sections 3187 and 3188 provide the lien which may be enforced against appellants, the Court ignores the fact that there is no provision in the 1921 Act for a lien for an erroneous refund and the fact that only the Revenue Acts of 1924 and 1926 provide for adding an erroneous refund to a deficiency in tax. The actual deficiency in tax has been paid (R. 10, 11), so that

nothing remains unpaid but the erroneous refund and no lien exists for that under Section 409. The decision therefore erases all liability of appellants.

(By failure to grant appellants' prayer for injunction to prevent distraint under the existing ineffective warrant, the foregoing effect of the decision of this Court is the only one we can conceive.)

7. The decision of the Court ignores the clean cut distinction between Sections 407 and 409 of the Revenue Act of 1921. Section 407 relates to an "additional tax" found after "the amount of a tax" shown on a return made in good faith "has been fully paid" and provides its own method of collection and for a lien distinct from that provided in Section 409. Therefore, considering the Estate Tax Title of the Act as a whole, Section 409 can be said to provide a lien only for "the tax" shown on the return. The sections of the Estate Tax title can not be isolated and one deprived of meaning in order to give another a broader effect. Certainly Congress would not have provided a separate lien for "additional taxes" if it contemplated that the lien for "the tax" should operate for additional taxes, nor can it be expected that Congress intended that an additional tax should be protected by two liens—one for a ten year period and the other for an unlimited period. On examination of the comparative sections of the Revenue Acts of 1924 and 1926 it shows the intention of Congress to be to the contrary. (Cf. Sections 307 and 308 of the 1924 and 1926 Acts with Section 407 of the 1921 Act, and Sec-

tion 315 of the 1924 and 1926 Acts with Section 409 of the 1921 Act; which are to be found in the Appendix to Appellants' Brief. See *Oesterlein Machine Co.*, 1 B. T. A. 159, 161.)

8. The decision ignores the fact that Section 308 (a) of the Revenue Act of 1926 provides the only method for the recovery of the additional tax determined against the estate of Isidore Rosenberg by the Commissioner on September 25, 1926. (See Section 318 (a), Revenue Act of 1926.) Without resorting to that remedy, no lien, distraint or proceeding in Court might be had to enforce payment of the tax liability asserted.

9. The decision ignores the fact that, though Section 316 (a) of the 1926 Act may not be the exclusive remedy against transferees, it nevertheless bars assessment and distraint against transferees (such as appellants) if the Commissioner fails to resort to such section to enforce the liability of transferees. The Commissioner may waive his right to pursue a transferee under the section and resort to the Courts to collect from him, but he cannot thereby avoid the prohibition of distraint. (See Appellants' Reply Brief, pp. 20-22; *Michael v. Commissioner*, 22 B. T. A. 639, 642, 643.)

10. The decision errs in holding that the Collector has the power to seize and sell the property of appellants for any tax or deficiency due from the estate of Isidore Rosenberg, under the provisions of Revised Statutes, Sections 3187 and 3188, by virtue of the asserted continuing lien alleged to be created by Sec-

tion 409 of the Revenue Act of 1921 or by the lien which the decision seeks to create, for the following reasons:

(a) Until appellants are held to be liable as transferees for the asserted tax liability, and demand and notice for the payment of a transferee liability has been made upon them and they then refuse to pay the tax liability, no lien can be enforced against them or warrant of distraint issued under Sections 3186, 3187 and 3188, U. S. Revised Statutes (26 U. S. C. A. Sections 115, 116 and 117). (*Michael v. Commissioner,* 22 B. T. A. 639, 642.)

(b) Appellants have never been adjudicated to be liable for any part of any tax which may be due from the estate of Isidore Rosenberg, nor has any demand or notice to pay any determined transferee liability been made upon them or any of them.

(c) Distraint, seizure and sale of the property of appellants is forbidden by Sections 316 (a) and 308 (a) of the Revenue Act of 1926, unless the Commissioner elects to have their liability as transferees determined in accordance with those sections, and, as he has not done so the provisions of Sections 3186, 3187 and 3188 are not applicable against your appellants. (*Michael v. Commissioner,* 22 B. T. A. 639, 642, 643.) The decisions relating to transferee proceedings before the Board hold only that the remedy of suit for recovery against transferees is not barred. Sec-

tion 316 is an alternative remedy, and the Courts have in no way limited or held improper the restrictions on distraint, seizure and sale provided therein.

12. The decision is in direct conflict with *Phillips v. Commissioner,* 283 U. S. 589, 597; *Lion Coal Co. v. Anderson,* 62 Fed. (2d) 325, 328; *United States v. Garfunkel,* 52 Fed. (2d) 727, 729, and other decisions of Federal Courts in holding that a tax liability may be enforced against a transferee of the taxpayer's property by distraint without proceedings being taken under Sections 316 (a) and 308 (a) of the 1926 Act. The cumulative remedy, suit in equity, does not contemplate a lien or distraint. No suit has been brought in this case.

13. The decision is in direct conflict with *Dreyfuss Dry Goods Co. v. Lines,* 24 Fed. (2d) 29, 31, in holding that Section 3187, U. S. Revised Statutes, contemplates the distraint and sale of property belonging to any one else than the delinquent taxpayer (which in this case was the estate of Isidore Rosenberg, deceased).

14. The decision is in direct conflict with *United States v. Cruickshank,* 48 Fed. (2d) 352, 356 and 357, in holding, contrary to the provisions of Section 318 (a), that the Revenue Act of 1926 does not absorb and thereby repeal Section 409 of the Revenue Act of 1921.

15. That unless it intended to reverse the decision in *Kelley v. United States,* 30 Fed. (2d) 193, the

decision of this Court is in direct conflict with that case, which properly held that "When once paid, a tax is gone" and lien against the property is discharged. While the Kelley decision held that a refund would not restore the lien, it is equally true that the finding of an additional tax would not restore it under Section 409 of the 1921 Act or the similar provisions of subsequent acts, because a special lien with a special method of collection is provided for additional taxes or deficiencies. (Sec. 407, Act of 1921; Sec. 308 (b), 1926 Act.) The Court should bear in mind that the *Kelley* case was a suit to recover an erroneous refund under the alleged authority of Section 409 of the 1918 Act (which is identical with Section 409 of the 1921 Act herein involved) and on the assumption that there was a lien under that section the United States brought suit. The Court held that there was no lien and recovery could not be had on the theory that a lien existed. Also, it should be borne in mind that in its decision in this case the Court has ignored the decision of the Board of Tax Appeals and, therefore, in apparently holding that Section 409 is warrant for the lien in this case, it is recognizing that only the amount of an erroneous refund is involved in this case. Therefore, as the Court declared in the *Kelley* case, there can be no existent lien under Section 409.

16. The decision is in direct conflict with *Levy v. Commissioner*, 48 Fed. (2d) 725. 726, wherein the facts are parallel to those involved in this case, in that the Court therein held that Sections 307 and 308 of the Revenue Act of 1926 were properly applicable to the

enforcement of a deficiency (which included an erroneous refund) although the return was made and the tax paid thereon while the 1921 Act was in force and before the due date therefor prescribed in Sections 406 and 408 of that Act. By that decision this Court held that where the tax shown on the return filed under the 1921 Act was paid before the due date and where the deficiency was not determined until after the 1926 Act went into effect the resort to Sections 307 and 308 was proper. If that decision was correct, and we believe it was, then the decision herein challenged repealed the *Levy* decision, as well as *Rosenberg v. Commissioner* (supra), or else the Court improperly held in this case that Section 409 provided a lien which could be arbitrarily collected without process from any owner (even a purchaser for value) of property which had once been a part of an estate until the ten year period expired. The comment made by the Court in the challenged decision (p. 5) states the fact that the deficiency determined in the *Levy* case "included the amount of the refund does not effect our conclusions". If that statement is now the opinion of the Court, the *Levy* case must fall, because in this case the Court has refused to recognize Section 407 of the 1921 Act, which provided for additional taxes and was the foundation for Sections 307 and 308 of the 1926 Act upon which the *Levy* case was based, and seeks to utilize Section 409 of the 1921 Act as the basis for an undescribable lien of infinite scope, even though that section does not contemplate an erroneous refund and the 1921 Act does not provide that an erroneous refund is part of a tax.

17. The decision is in direct conflict with *Page v. Skinner,* 298 Fed. 731, upon which the decision of this Court relies as a partial basis for the lien which it declares. While we do not admit the applicability of that decision to the case at bar, we submit that, if the Court relies upon the portion of the decision quoted on page 4 of its decision in this case, it must also hold that the lien is enforceable by sale only after proceedings in Court. The Commissioner has refused to resort to any proceedings against appellants except to attempt distraint on the property of appellants on a warrant issued against the administrator, when the liability of appellants for any tax of the estate has never been determined to permit collection from them by any means.

18. The decision is in error in denying that appellants are entitled to injunctive relief for the following reasons:

(a) The only injunctive relief sought by appellants is against the Collector for attempting to sell their property under a warrant of distraint addressed only to the administrator of the estate of Isidore Rosenberg, deceased, and which was issued as a result of assessment and under the specific provisions of Sections 307 and 308 of the Revenue Act, which the decision of this Court entirely ignores.

(b) The Court has ignored the fact that *no* proceedings for distraint under any other provision of any other statute have been taken by the Collector.

(c) The Court has ignored the fact that appellants are distributees (transferees) of the estate of Isidore Rosenberg, deceased, and that they have never been determined to be liable for any tax or deficiency in tax of said estate.

(d) The Court has ignored the fact that appellee has conceded the authority of *Long v. Rassmussen,* 281 Fed. 236, 238, as authority for injunction in this case. Appellants are non-taxpayers and are entitled to relief.

(e) As the Court's present decision is written, appellants are entitled to injunction because the Court does not, and cannot under the issues, determine a transferee liability against appellants.

(f) The entire reasoning of the Court in its opinion does not disclose any warrant for denial of the injunctive relief prayed for. The decision that the property "was impressed with the lien and is subject to seizure and sale" does not abolish the prerequisites for enforcing the lien, i. e. assessment as prescribed in R. S. Section 3182 (26 U. S. C. A., Sec. 102), demand for payment on the person liable to pay the tax as prescribed by R. S. Sections 3186 and 3187 (26 U. S. C. A., Secs. 115 and 116), refusal of the person liable to make payment and issuance of a distraint warrant against him, as prescribed in R. S. Section 3188 (26 U. S. C. A., Sec. 117). Appellants have never been determined to be liable for the tax and, in addition, none of the foregoing prerequisites to enforcement of distraint have been taken

by the Commissioner or Collector. It is this action of the Collector which we seek to restrain and not his lack of action on assumed liens which he has never attempted to enforce.

ARGUMENT.

I. RIGHT TO INJUNCTION.

Appellee has conceded that appellants are entitled to injunctive relief against the Collector for unauthorized trespass upon appellee's property, if they are not liable for the tax (Appellee's Brief, pp. 33 and 34), under his approval of the doctrine laid down in *Long v. Rassmussen,* 281 Fed. 236, 238, and the Court has apparently accepted this concession. (Decision, p. 1.) Should the Court desire to consider the various other grounds which are authority for granting the injunction sought in this proceeding, we refer to pages 27 to 53 of appellants' brief for a complete consideration of that issue.

However, appellee has attached a reservation to the foregoing concession by stating that if "the Collector was seeking to enforce a statutory lien for a deficiency in tax properly assessed, appellants have not made out a case to support this prayer for injunctive relief." This reservation apparently does not find approval by the Court, nor does it conform to the position assumed by appellee in his brief or to any statute.

In his brief, appellee relies entirely upon Section 409 of the Revenue Act of 1921, and its correspond-

ing sections (Section 315) in the Acts of 1924 and 1926, which provide a ten-year lien for *the tax.* (See Appellee's Brief, pp. 7, 15-23.) It should be noted that appellee carefully ignores the effects of Section 407 of the 1927 Act and Section 308 (a) of the 1926 Act. The reservation mentioned above under the exact language contained in the brief does not affect its concession or deprive appellants of their right to injunction. It is well established law that a lien "is not created by law itself, without any action by officers under the law." (*The United States v. The Pacific Railroad,* 1 Fed. 97, 102, 103.)

It matters little to appellants whether a lien arose as a result of the assessment made under Section 308 of the Revenue Act of 1926, or under Section 409 of the Revenue Act, or through the decision of the Court which we seek to review. If any lien existed it could not be attacked until the Collector moved to enforce it. In this case the Collector has moved on only one asserted lien. He filed a notice of lien under the assessment made on the determination of a "deficiency" by the Board of Tax Appeals and by the Collector under Section 308 of the 1926 Act. The notice of deficiency was addressed to the executrix of the estate of Isidore Rosenberg, deceased, the notices and demand for payment were addressed to that estate, the notice of tax lien asserted a lien against the estate, and the warrant of distraint was directed to the estate. In none of these proceedings were appellants named. When all the above mentioned acts were performed there was no property in the estate subject to a lien which the Collector might enforce under Section

308 of the 1926 Act and Revised Statutes, Section 3186 (26 U. S. C. A. 115), the only provisions under which the Collector might act on the determination, assessment and advice of the Commissioner. (*Pool v. Walsh,* 282 Fed. 620, 621; *Livingstone v. Becker,* 40 Fed. (2d) 673, 674, 675; *Long v. Rassmussen*, supra.)

Because the gross estate had vanished and all property had been distributed, the proceedings against the estate of Isidore Rosenberg were ineffective. The lien which the Collector was attempting to enforce was non-existent and of no effect, because it was directed to the estate and the estate had nothing to which the lien might attach. No broader interpretation may be made of this conclusion, because no other assessment has been made, no other demand for and notice of payment has been given, no other distraint warrant issued, and no other notice of lien filed as disclosed by the bill of complaint.

This Court must confine itself to the action of the Collector complained of, and not consider other steps which might be attempted. We seek to enjoin the Commissioner from trespass on the property of appellants in attempting to collect a tax assessed against the estate by sale under distraint warrant issued against the estate, when the property was not a part of the estate and belonged to appellants long before the deficiency sought to be recovered was determined. No lien on the property could exist under these circumstances. This suit is not to restrain assessment or collection of the tax against the estate, but to enjoin trespass upon the property of appellants. The appellants are not taxpayers and have never been deter-

mined to be liable for the tax. This situation places appellants squarely within the provisions of the decision in *Long v. Rassmussen*, 281 Fed. 236, 238, which both the Court and the appellee concede to be adequate authority for the issuance of injunction against appellee. (For further authorities and argument, see Appellants' Brief, pp. 27-53.) It must be remembered that the remedy alternative to that provided in Section 316 of the 1926 Act to hold appellants liable as transferees is a suit in equity under the "equitable trust doctrine." If that doctrine is resorted to the prohibitions against distraint provided in Section 316 remain in force.

II. THE LIEN.

With all respect to the Court, it appears that it has been led to erroneous conclusions, regarding the lien involved and the remedy sought, through over-reliance on appellee's brief, which confuses the issues and omits consideration of the essential elements of statutory law involved. The brief and the decision seek to place appellants in the position of contesting a lien and a tax. As the decision reads, its meaning can be understood only by referring to appellee's brief. The points of importance in appellants' briefs stand ignored and unanswered in the decision. This comment is made with regret, but, because the issues herein involved are of such great public importance, we reluctantly state what appears to be the situation.

There is only one lien before this Court and that one is ineffective, because it could not be impressed on the property of appellants under Section 308 of the

1926 Act, due to the fact that no deficiency in tax was determined until after appellants received their property and that when the tax was found, distraint warrant issued, and lien filed against the estate of Isidore Rosenberg there was nothing in the estate to which a lien could be affixed. The distributees were not taxpayers and the tax could not be collected from them by sale of their properties until they were determined to be liable. (*Lion Coal Co. v. Anderson*, 62 Fed. (2d) 325, 328.) The Commissioner refused to determine them liable. (R. 21.) It was the realization of this fact which probably led appellee to divert the Court's attention from the unenforceable situation and the unlawful attempt to levy from which appellants seek relief by injunction.

Ignoring the unenforceability of the warrant of distraint and the useless lien described above, appellee asserts a lien which he claims to have attached on the date of death, affixed itself fast to the items of property of the estate, and was operative against not only the taxpayer estate, but against all successors to title of the property of the estate which was distributed, for a period of ten years after decedent's death. This asserted lien is in direct conflict with Section 407 of the 1921 Act and Section 308 (a) of the 1926 Act, and is one which would permit levying upon the property of a distributee and even the property of innocent purchasers for value, if during the ten-year period some tax, additional tax or deficiency is found. (See Appellee's Brief, pp. 23 and 24.) From reading the decision is would appear that the Court had adopted this erroneous theory.

As the foundation of this asserted lien appellee relies upon Section 409 of the Revenue Act of 1921, which states

> "*That unless the tax is sooner paid in full, it shall be a lien for ten years* upon the gross estate of the decedent."

The Court holds that the ten years runs from the date of death of a decedent, which we do not believe to be the correct interpretation of the section when it is read in conjunction with Sections 406, 407 and 408. The Court failed to consider these sections in its decision.

Regardless of when the ten-year period commences, there are provisions in Sections 407 and 408 of the 1921 Act which the Court should not ignore, as it did in its decision and as appellee carefully did in his brief. Section 407 must be given careful consideration, because it is the predecessor to Sections 307 and 308 of the 1926 Act under which the proceedings against the estate to recover an additional tax or deficiency were commenced and the distraint warrant herein complained of was issued.

Section 407 provides

> "*That where the amount of tax shown on a return made in good faith has been fully paid* * * * and an *additional amount of tax is* * * * *found to be due,* then such additional amount shall be paid upon notice, and demand by the collector and *if it remains unpaid* * * * shall, until paid, be and *remain a lien* upon the entire gross estate."

Section 407 provides for a tax in addition to that shown on the return, creates a lien of a different character and term than that provided in Section 409, and provides a different method of collection than that provided in Section 408 for the tax shown on the return. Section 407 creates a distinctly different tax from that found in Section 409, and this is emphasized by the third paragraph of Section 407, which provides that: "If the executor files a complete return" and pays *the tax* thereon he is entitled to apply for and receive from the Commissioner a discharge from his personal liability:

> "*Provided, however,* that such discharge shall not operate to release the gross estate from the lien for any *additional tax* that may thereafter be found to be due" * * *.

This quoted portion of Section 407 of the 1921 Act should be read in conjunction with the provision for discharge of the executor from liability found in Section 409 of the same Act, i. e.,

> "If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed."

Why should Sections 407 and 409 provide for alternative releases for the liability of the executor when the release under Section 409 completely discharges the lien, and Section 407 reserves the lien for addi-

tional taxes, if Section 409 contemplates a lien for all taxes as appellee contends?

A reading of the foregoing provisions of Section 407 and then referring to Section 409 is convincing that Section 409 applies only to the tax shown on the return, and, when the returned tax is paid no lien continues under Section 409. Section 408 bears out this conclusion, for it provides the method for collecting *the tax* shown on the return, while Section 409 provides no method of collection. The germane part of Section 408 reads as follows:

> "That if *the tax* herein imposed is not paid on the *due date* thereof, the Collector shall, upon instructions from the Commissioner, proceed to collect *the tax* under the provisions of general law, or commence appropriate proceedings in any court of the United States * * * to subject the property of the decedent to be sold under the judgment or decree of the court."

It can readily be seen that the provisions for collecting "the tax" (the one shown on the return) and enforcing the lien imposed by Section 409 are different from those provided for "an additional amount of tax." This would seem conclusive of the soundness of our claim that when "the tax" shown on the return was paid, the lien under Section 409 did not take effect or was discharged. Had the 1921 Act continued in force until the deficiency herein at issue had been determined, the Commissioner would have been compelled to find an additional tax under Section 407 of the 1921 Act, just as he determined a deficiency in tax in this case under Sections 307 and 308 (a) of the

1926 Act. (The successors to Section 407.) Also, he would have been compelled to resort to Section 407 to collect the "additional tax," for Section 408 would not have afforded him relief.

Certainly it is far-fetched to say that Section 409 contemplated an enduring lien to cover "additional taxes" when Section 407 provides a special lien for "additional taxes." To say that, is to say that Congress provided two liens for an "additional tax," which is infrequent, while it provided only one lien for "the tax" returned, which occurs in every estate. Yet that is what appellee contends for and what the Court has decided.

III. THE DISTRAINT HEREIN SOUGHT TO BE ENJOINED HAS NO RELATION TO THE LIEN PROVISIONS OF THE REVENUE ACT OF 1921 OR THE LIEN PROVISIONS OF ANY ACT OTHER THAN SECTIONS 307 AND 308 OF THE 1926 ACT.

The warrant of distraint in this case and the assessment under the authority of which it was issued resulted from the judgment of the Board of Tax Appeals. (*Rosenberg v. Commissioner,* 14 B. T. A. 1340.) No warrant of distraint to enforce any lien was ever issued, nor is the present case predicated on any warrant of distraint other than the one issued on the assessment made under the determination of the Board of Tax Appeals. (R. 12.)

The Board has no jurisdiction to review estate taxes as returned, but can only review "additional taxes" or a "deficiency in taxes" found by the Commissioner after the estate tax return has been filed. (Title X,

Section 904, of the Revenue Act of 1926; Sections 306, 307 and 308 of the same Act.) No proceedings before the Board may be maintained to enforce *the tax* shown on the return, because no grant of power to review that tax has been made by Congress. (Section 1000, Revenue Act of 1926, Section 904.)

If the Commissioner now has a right of election to ignore the proceedings before the Board of Tax Appeals and the right to rely upon Section 409 of the Revenue Act of 1921 and its present counterpart, Section 315 of the 1926 Act, his assessment and appellee's notice and demand for payment and the warrant of distraint made under the decision of the Board are voided by the election and he is without remedy. He must either abandon all attempt to proceed under the decision of the Board, which he seems to have done with the approval of the Court, or concede that his present claim is beyond power of collection.

The decision of the Board of Tax Appeals in *Rosenberg v. Commissioner* (supra) is either void or effective. Nowhere in the Revenue Acts of 1924, 1926, 1928 or 1932, is the Commissioner given power to declare a decision of the Board of Tax Appeals void or ineffective, therefore, such decision must be effective. The decision determines a liability for a "deficiency in tax," not a liability for "the tax." The Commissioner inaugurated the proceeding before the Board by mailing a notice of deficiency to the estate and it responded thereto by filing a petition on appeal. (R. 11.) Now, by attempting to assert a lien for "the tax" under Section 409 of the Revenue Act

of 1921, he is arbitrarily violating the decision of the Board and attempting to seize and sell the property of petitioners without shadow of law to support him in order to avoid injunction, and the Court's decision upholds this arbitrary action by refusal to grant the injunction sought.

The present warrant of distraint was issued under the apparent authority of Section 308(b) of the Revenue Act of 1926, because it is that section which requires assessment and notice and demand from the Collector for a "deficiency" or "additional tax". Without assessment and notice and demand for payment (all of which were made against the estate in this case (R. 11, 12)), without resort to that section no distraint warrant could have issued against the estate.

As the decision of this Court appears to interpret the law, any distraint warrant issued for any kind of a tax may be utilized to distrain the property of a person other than the taxpayer to whom the warrant is addressed for a tax liability of a different classification. If respondent is to seize and sell appellants' property under the warrant of distraint now outstanding on the assertion that a lien continues under Section 409 of the 1921 Act, he must proceed under Section 408 of that Act, or its successor Section 314 of the 1926 Act. These two sections provide the method of collection to enforce the lien provided by Section 409 of the 1921 Act and Section 315 of the 1926 Act, and both provide that "the Collector shall, upon instruction from the Com-

missioner, proceed to collect the tax under the provisions of general law." He may not proceed to collect the erroneous refund which was included in the "deficiency" determined under the 1926 Act, hence the 1921 Act provides no lien or method of collection for an erroneous refund, nor does Section 315 of the 1926 Act provide for such a lien.

The general law is found in the revised statutes. R. S. Section 3182 (26 U. S. C. A. Sec. 102) requires the Commissioner to assess the tax and deliver the assessment list to the Collector. This he has not done under Section 409 of the 1921 Act. R. S. Section 3184 (26 U. S. C. A. Sec. 104) requires the Collector to give notice and make demand on the taxpayer within ten days after receiving the assessment list from the Commissioner. This has not been done, because no proper assessment has been made to provide for a demand or notice of sale in accord with the section. Unless these two preliminaries have been complied with, no legal warrant of distraint may issue or seizure and sale made. Appellee has not resorted to the provisions of general law under Section 408 of the 1921 Act or 314 of the 1926 Act, and his right to so proceed is now barred by Section 1109 of the Revenue Act of 1926.

IV. CONCLUSION.

The decision of this Court, in denying injunctive relief, has failed to consider the only issue presented to it by the pleadings, i. e. May the Collector seize

and sell appellants' property under a warrant of distraint addressed to the estate under proceedings had only against the estate, when such proceedings were instituted and said warrant issued long after the estate had been distributed and when no transferee liability has ever been determined against appellants? Excepting the portion of the decision denying the exclusive right for a determination of transferee liability under Section 316 of the 1926 Act, the decision is predicated on issues not presented to the Court by the record and the denial of the injunction is based on alleged possible situations, which were raised in appellee's brief, upon which no action has been attempted by the Collector and which, therefore, are not subject to attack or moot decision.

On the actual issue, appellee has conceded that appellants are entitled to injunctive relief, regardless of Section 3224 Revised Statutes. (See, Appellee's Brief, pp. 33, 34.) In addition to that concession, the appellants are entitled to injunction under Section 316 of the Revenue Act of 1926, regardless of the Court's determination that Section 316 does not create an exclusive remedy to recover from transferees. Section 316 of the 1926 Act provides a remedy to which the Commissioner may resort for determination of a transferee liability. If he does not elect that remedy, the Collector is barred from assessment, collection and distraint against a transferee, for his only alternative remedy is one before a Court and collection under judgment of the Court is by judgment lien, after entry of judgment, and not by statutory lien.

It is respectfully submitted that a rehearing of this proceeding should be granted both in justice to the Court and to appellants.

Dated, San Francisco,
July 19, 1933.

Respectfully submitted,
ADOLPHUS E. GRAUPNER,
Attorney for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for the appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is made in good faith and is not interposed for delay.

Dated, San Francisco,
July 19, 1933.

ADOLPHUS E. GRAUPNER,
Attorney for Appellants and Petitioners.

No. 6873

United States Circuit Court of Appeals

For the Ninth Circuit.

JAMES McCULLOCH, JR.,

Appellant,

vs.

THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

FILED
JUN 17 1932
PAUL P. O'BRIEN,
CLERK

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

JAMES McCULLOCH, JR.,

Appellant,

vs.

THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a corporation,

Appellee.

Transcript of Record.

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Parker, Stone & Baird Co., Law Printers, Los Angeles.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Los Angeles, California.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF
CALIFORNIA SOUTHERN DIVISION

JAMES McCULLOCH, JR.,) No. A-5-M-Eq.

Plaintiff,)

-vs-) CITATION ON APPEAL

PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a corporation,)

Defendant.)

UNITED STATES OF AMERICA) ss.

TO THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, A CORPORATION; AND TO MESSRS. O'MELVENY, TULLER & MYERS, J. R. GIRLING AND STEARNS, LUCE & FORWARD, ITS ATTORNEYS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal from the District Court of the United States for the Southern District of California, Southern Division, in a suit wherein James McCulloch, Jr. is appellant and you are appellee, to show cause, if any there be, why the judgment and order rendered against said James McCulloch, Jr. should not be

corrected and why speedy justice should not be done to the parties on that behalf.

DATED: SAN FRANCISCO, CALIFORNIA
December 28, 1931.

Curtis D. Wilbur
Judge of the Circuit Court for the 9th Circuit

Service of a copy of the foregoing citation is acknowledged this 4th day of January, 1932.

O'Melveny, Tuller & Myers.
M. A. T.
Attorneys for defendant.

[Endorsed]: Filed Jan. 4-1932. R. S. Zimmerman, Clerk, by C. A. Simmons, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

No A-5-M

JAMES McCULLOCH, JR., Plaintiff	COMPLAINT TO DECLARE POLICIES OF INSURANCE IN FORCE AND FOR RECOVERY OF BENEFITS THEREUNDER.
- vs -	
THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation. Defendant	

Plaintiff, complaining of the defendant, complains and alleges:

1.

That the defendant, THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, is now, and at the times hereinafter mentioned, was, a Corporation, duly organized, created and existing under and by virtue of the laws of the State of Pennsylvania, authorized and empowered to do business in the State of California, and having an office and general agent in the City of San Diego, State of California.

2.

That on or about the 14th. day of October, 1925, at the City of San Diego, County of San Diego, State of California, in consideration of the payment by plaintiff to the defendant of the annual premium of Two Hundred and Seventy Five and 60/100 ($275.60) Dollars, defendant made and delivered to plaintiff its policy of insurance, in writing, agreeing to pay the beneficiary named in said policy of insurance the sum of Ten Thousand Dollars ($10.000) upon the death of plaintiff.

3.

That in and by said policy of insurance aforesaid, same being numbered 1191014, it was further agreed and provided that should the plaintiff become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest borthday is sixty years, the defendant, Corporation, agreed to pay to plaintiff a monthly income of one per cent. (1%) of the face of the policy, to-wit: the sum of $100.00 per month, from the beginning of such total and permanent disability, as aforesaid, and in and by said policy of insurance aforesaid, further agreeing, in the event of such total and permanent disability of the plaintiff, to continue said policy of insur-

ance in force and waive the payment of all further premiums thereon during the continuance of such total and permanent disability, as aforesaid.

4.

Plaintiff alleges that in and by said policy of insurance, and the provisions thereof, and in consideration of the payment of the premium therefor, as above stated, he was insured in defendant Corporation for said sum of Ten Thousand ($10.000) Dollars, and entitled to all the benefits therein mentioned and provided for a period of one year, plus grace period, from October 14, 1925. That before the next policy anniversary, and before the sixtieth anniversary of the age of the insured, and on July 31, 1926, plaintiff was taken sick and became ill with a bodily ailment and disease, to-wit: Pulmonary Tuberculosis, and was confined to his bed for a period of nine weeks from said last mentioned date, and was confined to his home from said time to about April 9, 1927, when plaintiff was again confined to his bed and was compelled to remain therein from said last mentioned date to the latter part of August, 1927, and in consequence of said illness and disease, plaintiff became, was, and is permanently and totally disabled from engaging in any occupation whatsoever for remuneration or profit. That said disease, indepen*dl*y from all other causes, and within the terms of said insurance, has resulted in permanent disability, wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from said July 31, 1926, continuing to date hereof, and as plaintiff is informed and believes, such incapacity, due to said illness and disease aforesaid, will continue for an indefinite period in future.

5.

That on November 14, 1926, plaintiff made, executed and delivered to the defendant his certain promissory note in the sum of $275.60, the same bearing interest at the rate of six per cent. per annum, in payment of the premium due on said policy of insurance on October 14, 1926, said promissory note being accepted by said defendant Corporation in payment of said premium aforesaid, and, as plaintiff is informed and believes, continued said policy of insurance, and the benefits thereunder, in force, to October 14, 1927, and the grace period thereafter. That the due date of said promissory note was February 14, 1927. That at said time plaintiff was further insured in defendant Corporation in the sum of $20.000, represented by two certain policies of insurance issued to plaintiff by defendant Corporation, and at or about said time, plaintiff, in payment of the premiums on said two last mentioned policies of insurance made and delivered, at the request of defendant said agent in the City of San Diego, California, a post-dated check in the sum of $300.00. That shortly after the date*d* mentioned in said check, as its due date, plaintiff being unable to meet the payment thereof, the general agent of defendant Corporation in the City of San Diego, California, threatened the plaintiff with criminal prosecution for the issuance and non-payment of said check, and delivered said check over to the District Attorney of the County of San Diego, California, for criminal action and prosecution thereon. That the plaintiff, because of his said illness and disease aforesaid, and being unable to follow or engage in any occupation for remuneration or profit, was unable to pay said promissory note, dated November 14, 1926, and being

unable by virtue of said illness and disease to engage*d* in or follow any occupation for remuneration or profit, to meet the payment of said post-dated check, on the day on which same became due and payable, the defendant Corporation by and through its general agent and representative in the City of San Diego, California, wrongfully and fraudulently demanded the return and surrender of said policies of insurance, heretofore mentioned, including policy of insurance No. 1191014, and threatened plaintiff with further criminal prosecution should he fail or refuse to so surrender said policies of insurance to the defendant Corporation. That plaintiff, being extremely ill and suffering with said disease aforesaid, and believing that he would be criminally prosecuted should he fail or refuse to surrender said policies of insurance to said defendant Corporation, and laboring under said duress and bodily illness, and without knowledge or information as to his rights under said policy of insurance, No. 1191014, or the other two said policies, aforesaid or the benefits which would accrue to him under said policy of insurance, and because of said threats, duress and illness, as aforesaid, surrendered and delivered said policy of insurance, No. 1191014 to defendant's said agent, as aforesaid, on or about March 8, 1927.

6.

That plaintiff had been informed by the physicians who were in attendance upon him during his said illness aforesaid, that the nature of the illness and disease with which he was then suffering was Pneumonia and *Pluresy* with Effusions, and plaintiff continued in said belief, as he was so advised by his said physicians, aforesaid, to on or about July 6, 1927, and was not aware of his true condi-

tion, or the true and exact nature of his said illness and disease, or that he at that time, or had been theretofore suffering with Pulmonary Tuberculosis, or that he had been, or would be totally and permanently disabled from engaging in any occupation for remuneration or profit, until or about said July 6, 1927, when, upon being examined by a physician, other than the ones in attendance upon him, he was then informed for the first time that his disease was Pulmonary Tuberculosis, and not Pneumonia or *Pluresy* with Effusions, as he was theretofore led to believe, and that he was stricken with said Pulmonary Tuberculosis on said July 31, 1926, the date of his first confinement to his bed as aforesaid.

That at said time, because of the fraud and duress practiced upon plaintiff by the defendant's said agent and representative as aforesaid, and as is specifically mentioned and referred to in paragraph marked (5) herein, plaintiff not being in possession of said policy of insurance, and being in complete ignorance of the disability features therein mentioned and contained, or that he was entitled to disability benefits thereunder, and was in complete ignorance of, and unaware of the requirements of said policy of insurance relative to Notices and Proofs to be furnished the defendant Corporation in the event of total or permanent disability of the plaintiff as aforesaid. Plaintiff alleges that he did not become aware of the requirements in said policy of insurance relative to Notices and Proofs to the defendant Corporation, in the event of total and permanent disability of the plaintiff, nor was he aware the *the* disease and illness with which he was then suffering was such a disability as was covered by said policy of insurance and would enable plaintiff to be

entitled to the benefits mentioned and recited in said policy of insurance, until on or about April 10, 1929, when, in response to plaintiff's request the defendant Corporation forwarded to plaintiff a copy of said policy of insurance aforesaid.

7.

That upon the discovery by plaintiff that said policy of insurance was in force and was effective at the time of his said illness, as aforesaid, as plaintiff is informed and believes, plaintiff requested claim blanks of said defendant Corporation for the purpose of filing his said claim for total and permanent disability suffered by plaintiff, and cause the payment to him of the disability benefits mentioned and recited in said policy of insurance, from the date of his said disability, to-wit: July 31, 1926, to date thereof, and thereafter during the period of his total and permanent disability, as aforesaid, but defendant Corporation refused to permit plaintiff to file such claim for said disability aforesaid, and failed and refused to pay plaintiff the disability benefits thereing mentioned and recited, to-wit: the sum of One Hundred ($100.00) Dollars per month from July 31, 1926 as aforesaid, and thereafter during the period of his total and permanent disability, as aforesaid, and has failed and refused to pay plaintiff any sum or sums whatsoever on account of same.

8.

That plaintiff has duly performed all the conditions of said policy of insurance on his part to be performed, and defendant Corporation has paid no part of said sum designated as disability benefits under said policy of insurance No. 1191014, and there is now due, owing, and unpaid by the defendant Corporation to the plaintiff the sum of

THIRTY SEVEN HUNDRED ($3700.00) DOLLARS, together with interest thereon, as of September 1, 1929, and thereafter at the rate of ONE HUNDRED ($100.00) DOLLARS per month during the period of plaintiff's said disability, as aforesaid.

AND FOR A FURTHER AND SECOND CAUSE OF ACTION, Plaintiff alleges:

9.

Plaintiff hereby adopts the allegations contained in paragraph marked (1) of his First Cause of Action herein, and refers to same and makes same a part of this his Second Cause of Action, as fully as i*s* the same were set forth in full herein.

10.

That on or about the 27th. day of November, A. D. 1925, at the City of San Diego, County of San Diego, State of California, the plaintiff made, executed and delivered to the defendant Corporation his certain promissory note in the sum of FIVE HUNDRED AND FIFTY ONE and 20/100 ($551.20) DOLLARS, bearing interest at the rate of six per cent. per annum, in payment by plaintiff to the defendant of the annual premium of $413.40, in consideration of which the defendant made and delivered to the plaintiff its policy of insurance, in writing, agreeing to pay the beneficiary named in said policy of insurance the sum of FIFTEEN THOUSAND ($15,000) DOLLARS upon the death of plaintiff.

11.

That in and by said policy of insurance, same being numbered 1196774, it was further agreed and provided that should the plaintiff become totally and permanently

disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the defendant Corporation, agreed to pay to the plaintiff a monthly income of one per cent (1%) of the face of the policy, to-wit: the sum of One Hundred and Fifty ($150.00) Dollars per month, from the beginning of such total and permanent disability, as aforesaid, and in and by said policy of insurance aforesaid, further agreeing in the event of such total and permanent disability to the plaintiff to continue said policy of insurance in force and waive the payment of all further premiums thereon during the continuance of such total and permanent disability, as aforesaid.

12.

Plaintiff alleges that in and by said policy of insurance, and the provisions thereof, and in consideration of the making and executing by plaintiff of said promissory note, as aforesaid, and the acceptance of same by the defendant Corporation, he was insured in defendant Corporation for said sum of Fifteen Thousand Dollars, and entitled to all the benefits therein mentioned and provided for a period of one year, plus 31 days grace period, from November 27th, 1925. That before the next policy anniversary and before the sixtieth anniversary of the age of the insured, and on July 31, 1926, plaintiff was taken sick and became ill with a bodily ailment and disease, to-wit: Pulmonary Tuberculosis, and was confined to his bed for a period of nine weeks from said last mentioned date, and was confined to his home from said time to about April 9, 1927, when plaintiff was again confined to his bed and was compelled to remain therein from said last mentioned date to the latter part of August, 1927, and in consequence of

said illness and disease, plaintiff became, was, and is permanently and totally disabled from engaging in any occupation whatsoever for remuneration or profit. That said disease, independently from all other causes, and within the terms of said contract of insurance, has resulted in permanent disability, wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from said July 31, 1926, continuing to date hereof, and, as plaintiff is informed and believes, such incapacity, due to said illness and disease aforesaid, will continue for an indefinite period in the future.

13.

That the plaintiff, because of said illness and disease aforesaid, being unable to follow or engage in any occupation for remuneration or profit, was unable to pay said promissory note, dated November 25, 1925; that on innumerable occasions between November 25, 1926 and December 30th, 1926, defendant's said agent and representative called plaintiff by 'phone and visited him at his home, while plaintiff was confined to his home and his bed with said illness and disease, and insisted upon the payment of the note or the return and surrender to said agent of said policy of insurance. That said calls by said agent and representative were constant and continuous during said period, and his strenuous insistence upon payment or the return of the policy of insurance was a source of great annoyance and harassment to plaintiff, as well as worry, and caused his condition to become more serious and dangerous, against worry and annoyance he was advised by his physicians in attendance to refrain, and to rid himself of the constant and repeated calls and demands of defendant's said agent and representative for the

return of said policy of insurance, and the annoyance, harassment and worry incident thereto, plaintiff, at the strenuous insistence of defendant's said agent and representative, and for the purpose of securing relief from him, surrendered said policy of insurance to said defendant's said agent and representative aforesaid. That at the time of such surrender of said policy of insurance, as aforesaid, defendant Corporation, and Defendant's said agent and representative, well knew that plaintiff was suffering with Pulmonary Tuberculosis, and well knew that plaintiff was covered and protected by said policy of insurance, and was, and would be entitled to the benefits therein mentioned and provided, fraudulently, and for the pupose of deceiving the plaintiff, and fraudulently depriving, or attempting to deprive plaintiff of his said rights under said policy of insurance, advised plaintiff that his said policy of insurance had lapsed and he was no longer insured by virtue thereof, or entitled to the benefits therein recited, thus fraudulently and wrongfully procured the release and surrender of said policy of insurance to the defendant The plaintiff at said time, and for a long time thereafter, was ignorant of the true nature of his disease, and was not aware of the fact that he was suffering with Pulmonary Tuberculosis, though this fact was well known to the defendant Corporation, and its said agent and representative aforesaid, at said time.

14.

That plaintiff had been informed by the physicians who were in attendance upon him during his said illness aforesaid, that the nature of the illness and disease with which he was then suffering was Pneumonia and *Plurcsy* with Effusions, and plaintiff continued in said belief, as he

was so advised by his said physicians, aforesaid, to on or about July 6, 1927, and was not aware of his true condition, or the true and exact nature of his said illness and disease, or that he at that time, or had been theretofore, suffering with Pulmonary Tuberculosis, or that he had been, or would be totally and permanently disabled from engaging in any occupation for remuneration or profit, until on or about said July 6, 1927, when, upon being examined by a physician other than the ones in attendance upon him, he was then informed for the first time that his disease was Pulmonary Tuberculosis, and not Pneumonia or *Pluresy* with Effusions, as he was theretofore led to believe and that he was stricken with said Pulmonary Tuberculosis on said July 31, 1926, the date of his first confinement to his bed, as aforesaid.

That at said time, because of the fraud and duress practiced upon the plaintiff by the defendant's said agent and representative, as aforesaid, and as is specifically mentioned and referred to in paragraph marked (13) herein, plaintiff not being in possession of said policy of insurance, and being in complete ignorance of the disability features therein mentioned and contained or that he was entitled to disability benefits thereunder, and was in complete ignorance of, and unaware of the requirements of said policy of insurance relative to Notices and Proofs to be furnished defendant Corporation in the event of total and permanent disability of the plaintiff as aforesaid. Plaintiff alleges that he did not become aware of the requirements of said policy of insurance relative to Notices and Proofs to the defendant Corporation, in the event of total and permanent disability of the plaintiff, nor was he aware that the disease and illness with which

he was then suffering was such a disability as was covered by said policy of insurance and would enable plaintiff to be entitled to the benefits mentioned and recited in said policy of insurance, until on or about April 10, 1929, when, in response to the plaintiff's request the defendant Corporation forwarded to plaintiff a copy of said policy of insurance aforesaid.

15.

That upon the discovery by plaintiff that said policy of insurance was in full force and effect at the time of his said illness, as aforesaid, as plaintiff is informed and believes, plaintiff requested claim blanks of said defendant Corporation for the purpose of filing his said claim for total and permanent disability suffered by plaintiff, and cause the payment to him of the disability benefits mentioned and recited in said policy of insurance from the date of his disability, to-wit: July 31, 1926, to the date thereof, and thereafter during the priod of his total and permanent disability, as aforesaid, but defendant Corporation refused to permit plaintiff to file such claim for said disability aforesaid, and failed and refused to pay plaintiff the disability benefits therein mentioned and recited, to-wit: the sum of ONE HUNDRED and FIFTY ($150.00) DOLLARS per month, from July 31, 1926, as aforesaid, and thereafter during the period of his total and permanent disability, as aforesaid, and has failed and refused to pay plaintiff any sum, or sums, whatsoever on account of same.

16.

That plaintiff has duly performed all of the conditions of said policy of insurance on his part to be performed, and defendant corporation has paid no part of said sum

designated as disability benefits under said policy of insurance No. 1196774, and there is now due, owing, and unpaid by the defendant Corporation to the plaintiff, the sum of FIFTY FIVE HUNDRED AND FIFTY ($5550.00) DOLLARS, together with interest thereon as of September 1, 1929, and thereafter at the rate of ONE HUNDRED AND FIFTY ($150.00) DOLLARS per month during the period of plaintiff's said disability as aforesaid.

AND FOR A FURTHER AND THIRD CAUSE OF ACTION, Plaintiff alleges:

17.

Plaintiff hereby adopts the allegations contained in paragraph marked (1) of his First Cause of Action herein, and refers to same, and makes same a part of this his Third Cause of Action, as fully as if the same were set forth in full herein.

18.

That on or about the 27th. day of November, A. D. 1925, at the City of San Diego, County of San Diego, State of California, the plaintiff made, executed and delivered to the defendant Corporation his certain promissory note in the sum of FIVE HUNDRED AND FIFTY ONE and 20/100 ($551.20) DOLLARS, bearing interest at the rate of six per cent. per annum, in payment by plaintiff to the defendant of the annual premium of $122.50, in consideration of which defendant made and delivered to the plaintiff its policy of insurance, in writing, agreeing to pay the beneficiary named in said policy of insurance the sum of FIVE THOUSAND ($5,000) DOLLARS upon the death of plaintiff.

19.

That in and by said policy of insurance, same being numbered 1196773, it was further agreed and provided that should the plaintiff become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the defendant Company will waive the payment of any premium thereafter to become due thereon during the continuance of such total and permanent disability as aforesaid.

20.

Plaintiff alleges that in and by said policy of insurance, and the provisions thereof, and in consideration of the making and executing by the plaintiff of said promissory note, as aforesaid, and the acceptance of same by the defendant Corporation, he was insured by the defendant Corporation for the said sum of $5.000, and entitled to all the benefits therein mentioned and provided for a period of one year, plus 31 days grace period, from November 27, 1925. That before the next policy anniversary and before the policy anniversary on which the age of the insured at nearest birthday is sixty years, and on July 31, 1926, plaintiff was taken sick and became ill with a bodily ailment and disease, to-wit: Pulmonary Tuberculosis, and was confined to his bed for a period of nine weeks from said last mentioned date, and was confined to his home from said time to about April 9, 1927, when plaintiff was again confined to his bed and was compelled to remain therein from said last mentioned date to the latter part of August, 1927, and in consequence of said illness and disease, plaintiff became was, and is, permanently and totally disabled

from engaging in any occupation whatsoever for remuneration or profit. That said disease, independently from all other causes, and within the terms of said contract of insurance, has resulted in permanent disability wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from said July 31, 1926, continuing to date hereof, and as plaintiff is informed and believes, such incapacity, due to said illness and disease aforesaid, will continue for an indefinite period in the future.

21.

That plaintiff, because of said illness and disease aforesaid, being unable to follow or engage in any occupation for remuneration or profit, was unable to pay said promissory note, dated November 25, 1925; that on innumerable occasions between November 25, 1926 and December 30, 1926, defendant's said agent and representative called plaintiff by 'phone and visited him at his home while plaintiff was confined to his home and his bed with said illness and disease, and insisted upon the payment of the note or the return and surrender to said agent of said policy of insurance. That said calls by said agent and representative were constant and continuous during said period, and his strenuous insistence upon payment or the return of the policy of insurance was a source of great annoyance and harassment to plaintiff, as well as worry, and caused his condition to become more serious and dangerous, against worry and annoyance he was advised by his physicians in attendance to refrain, and to rid himself of the constant and repeated calls and demands of defendant's said agent and representative for the return of said policy of insurance, and the annoyance,

harassment and worry incident thereto, plaintiff at the strenuous insistence of defendant's said agent and representative, and for the purpose of securing relief from him, surrendered said policy of insurance to the defendant's said agent and representative aforesaid. That at the time of such surrender of said policy of insurance, as aforesaid, defendant Corporation, and defendant's said agent and representative, well knew that plaintiff was suffering from Pulmonary Tuberculosis, and well knew that plaintiff was covered and protected by said policy of insurance, and was, and would be entitled to the benefits therein mentioned and provided, fraudulently, and for the purpose of deceiving the plaintiff, and fraudulently depriving, or attempting to deprive plaintiff of his said rights under said policy of insurance, advised plaintiff that his said policy of insurance had lapsed, and he was no longer insured by virtue thereof, or entitled to the benefits therein recited, thus fraudulently and wrongfully procured the release and surrender of said policy of insurance to the defendant. That plaintiff, at said time, and for a long time thereafter, was ignorant of the true nature of his disease, and was not aware of the fact that he was suffering from Pulmonary Tuberculosis, though this fact was well known to the defendant Corporation, and its said agent and representative aforesaid, at said time.

22.

That plaintiff had been informed by the physicians who had been in attendance upon him during his said illness aforesaid, that the nature of his illness and disease with which he was then suffering was Pneumonia and *Pluresy* with Effusions, and plaintiff continued in said belief, as he was so advised by his said physicians, aforesaid, to

on or about July 6, 1927, and was not aware of his true condition, or the true and exact nature of his said illness and disease, or that he at that time, or had been theretofore, suffering with Pulmonary Tuberculosis, or that he had been or would be totally and permanently disabled from engaging in any occupation for remuneration or profit, until on or about said July 6, 1927, when, upon being examined by a physician, other than the ones in attendance upon him, he was then informed for the first time that his disease was Pulmonary Tuberculosis and not Pneumonia or *Pluresy* with Effusions, as he was theretofore led to believe, and that he was stricken with said Pulmonary Tuberculosis on said July 31, 1926, the date of his first confinement to his bed, as aforesaid.

That at said time, because of the fraud and duress practiced upon the plaintiff by defendant's agent and representative, as aforesaid, and as is specifically mentioned and referred to in paragraph marked (21) herein, plaintiff not being in possession of said policy of insurance, and being in complete ignorance of the disability features therein mentioned and contained, or that he was entitled to disability benefits thereunder, and was in complete ignorance of, and unaware of the requirements of said policy of insurance relative to Notices and Proofs to be furnished defendant Corporation in the event of total and permanent disability of plaintiff as aforesaid. Plaintiff alleges that he did not become aware of the requirements of said policy of insurance relative to Notices and Proofs to the defendant Corporation, in the event of total and permanent disability of the plaintiff, nor was he aware that the disease and illness with which he was then suffering was such a disability as was covered by said policy

of insurance, and would enable plaintiff to be entitled to the benefits mentioned and recited in said policy of insurance, until on about April 10, 1929, when in response to plaintiff's request the defendant Corporation forwarded to plaintiff a copy of said policy of insurance aforesaid.

23

That upon the discovery by plaintiff that said policy of insurance was in full force and effect at the time of his said illness, as aforesaid, as plaintiff is informed and believes, plaintiff requested claim blanks of said defendant Corporation for the purpose of filing his said claim for total and permanent disability suffered by plaintiff, and cause the waiver of all further and future premiums on said policy of insurance aforesaid during the period of his said total and permanent disability, as aforesaid, but defendant Corporation refused to permit plaintiff to file such claim for said disability benefit aforesaid.

24.

That plaintiff has duly performed all the conditions of said policy of insurance on his part to be performed.

WHEREFORE, plaintiff demands judgment:

1. That the said policies of insurance in the defendant Corporation, and designated as Policies of Insurance Numbered 1191014, 1196774 and 1196773, be declared by this Court to be in full force and effect.

2. That the premiums due on said policies of insurance in the defendant Corporation, and designated as Policies of Insurances numbered 1191014, 1196774 and 1196773 be declared by this Court to be waived from and after July 31, 1926, and until the total and permanent disability of plaintiff shall have been removed.

3. That plaintiff recover of the defendant, THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation, the sum of THIRTY SEVEN HUNDRED ($3700.00) DOLLARS, together with interest at seven per cent., per annum on installment thereon of $100.00 per month from July 31, 1926. to September 1, 1929. as provided in Policy of Insurance No. 1191014, in said Defendant Corporation.

4. That plaintiff recover of the defendant, THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation, the sum of ONE HUNDRED DOLLARS ($100.00) per month, from and after September 1, 1929, and during the continuation of the total and permanent disability of plaintiff, as provided in Policy of Insurance No. 1191014, in said defendant Corporation.

5. That Plaintiff further recover of the defendant, THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Coporation, the further sum of FIFTY FIVE HUNDRED AND FIFTY ($5550.00) DOLLARS, together with interest thereon at seven per cent. per annum on installments thereon of $150.00 per month from July 31, 1926, to September 1, 1929, as provided in Policy of Insurance No. 1196774, in said defendant Corporation.

6. That plaintiff further recover of the defendant, THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation, the further sum of ONE HUNDRED and FIFTY ($150.00) DOLLARS per month, from and after September 1, 1929, and during the continuation of the total and perma-

nent disability of plaintiff, as provided in Policy of Insurance No. 1196774, in said Defendant Corporation.

7. For plaintiffs costs herein expended, and for such other and further relief to which plaintiff may be entitled in the premises.

A. L. Wissburg
Attorney for Plaintiff,
541 Spreckels Th. Bldg
San Diego, Calif.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF CALIFORNIA
COUNTY OF SAN DIEGO.

JAMES McCULLOCH, JR., being first duly sworn, deposes and says, that he is the plaintiff in the above entitled action; that he has heard read the foregoing Complaint, and knows the contents thereof, that the same is true of his own knowledge, except those matters therein stated on his information or belief, and as to those matters that he believes it to be true.

James McCulloch, Jr.

Subscribed and sworn to before me this 13 day of September, 1929.

[Seal] D. M. Houser

Notary Public in and for the County of San Diego, State of California,

[Endorsed]: Filed Sep. 16, 1929. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause·]

ANSWER.

Comes now THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a corporation, the defendant above named, and as answer to plaintiff's bill on file herein admits, alleges and denies as follows:

AS ANSWER TO THE FIRST CAUSE OF ACTION:

-I-

Admits the allegation contained in Paragraph I of said bill.

-II-

Admits the allegations contained in Paragraph II of said bill.

-III-

Admits that in and by said policy of insurance aforesaid, the same being numbered 1191014, it was provided that certain benefits should be paid in the event of the total and permanent disability of the insured; but alleges that paragraph III of plaintiff's bill contains an inaccurate statement of the provisions of the policy for benefits by reason of permanent and total disability of the insured.

Denies that its agreement in and by said policy of insurance was "that should the plaintiff become totally and permanently disabled before the age of the insured at his nearest birthday is sixty years the defendant corporation will pay to the plaintiff a monthly income of one per cent (1%) of the face amount of the policy, to-wit, the sum of $100.00 per month, from the beginning of such total and permanent disability".

Alleges that in and by the terms of said policy it is agreed that defendant shall pay to the insured a monthly income equal to one per cent (1%) of the face amount of the policy if the insured becomes totally and permanently disabled before the policy anniversary at which his age is sixty (60) years, said income to start upon the date of the receipt by the company at its home office during the insured's lifetime of due proof of total and permanent disability; a true copy of which such policy is hereto annexed marked exhibit "A" and made a part hereof as though set forth in full at this portion of defendant's answer.

Defendant further alleges that it was agreed in and by the terms of the said policy aforesaid that disability benefits for permanent and/or total disability should terminate upon any default in the payment of any premium.

Defendant further denies that its agreement as set forth in the policy was "in the event of such total and permanent disability of the plaintiff to continue said policy of insurance in force and waive the payment of further premiums thereon during the continuance of such total and permanent disability", as alleged in plaintiff's bill; but on the contrary alleges that by the terms of said policy of insurance it agreed to waive payment of any premiums falling due after the receipt of due proof of total and permanent disability and during the continuance of the total and permanent disability of the insured.

-IV-

As answer to Paragraph IV of plaintiff's bill defendant admits that said policy of insurance No. 1191014 was in full force and effect for the period of one year plus the grace period of thirty-one (31) days from October 14,

1925. Defendant denies each and every allegation other than hereinbefore expressly admitted, contained in Paragraph IV of plaintiff's bill.

-V-

As answer to paragraph V of plaintiff's bill, defendant admits that plaintiff executed and delivered to defendant a certain promissory note for Two Hundred Seventy-five and 60/100 Dollars ($275.60) on November 14, 1926, on account of the premium due October 14, 1926, on said policy of insurance No. 1191014, which said promissory note was due February 14, 1927; but defendant denies that said promissory note, which said note was never paid by plaintiff, constituted payment of the said premium upon said policy of insurance.

Defendant denies that the acceptance of said promissory note by it continued the said policy of insurance and/or the benefits thereunder in force and/or effect to October 14, 1927, and/or the grace period thereafter; and upon the contrary alleges that the giving of said note by the plaintiff and the acceptance of it by defendant was a conditional payment of the said premium, and that the failure of plaintiff to pay said note when due, or at any time thereafter, breached said condition and voided the entire note transaction, thereby causing said policy of insurance to lapse as of October 14, 1926. Defendant admits that on or about November 27, 1925, it had issued two additional policies, numbers 1196773 and 1196774 in the respective amounts of Five Thousand Dollars ($5,000.00) and Fifteen Thousand Dollars ($15,000.00), on the life of plaintiff, and that on account of each such policies plaintiff had given defendant promissory notes totalling Five Hundred Fifty-one and 20/100 Dollars

($551.20) on account of the first year's premiums and interest. Defendant alleges that plaintiff never made any cash payment on account of any premiums under said two last mentioned policies No. 1196773 and No. 1196774.

Defendant admits that plaintiff delivered to defendant's agent in the City of San Diego, California, a post dated check for Three Hundred Dollars ($300.00) to be applied on account of his liability under the notes given on account of the premiums under said last mentioned policy, and defendant further alleges that said check was not paid when presented.

Defendant denies that its general agent or anyone, for and on its behalf, threatened plaintiff with criminal prosecution for the issuance and non-payment of said Three Hundred Dollar ($300.00) check. Defendant denies that its general agent, or any agent, in the City of San Diego, California, delivered said check over to the District Attorney of the County of San Diego, California, for criminal action and/or prosecution thereon.

Defendant denies that from November 14, 1926, to February 14, 1927, the insured, plaintiff herein, was unable, by virtue of his illness to engage in or follow any occupation for remuneration or profit. Defendant further denies that plaintiff was unable to pay said promissory note dated November 14, 1926, and/or make the payment of said post dated check on the day on which same became due and/or payable because of any illness and/or disease alleged in plaintiff's bill, or at all.

Defendant denies that by and/or through its general agent and/or representative in the City of San Diego, it wrongfully and/or fraudulently demanded the return and/or surrender of any policy of insurance issued by it

on plaintiff's life. Defendant further denies that it at any time by or through its general agent and/or representative in the City of San Diego threatened plaintiff with further criminal prosecution, or any prosecution, should he fail to surrender said policies, or any policies of insurance to it.

Defendant further denies that plaintiff surrendered said policy of insurance No. 1191014, or any policies, while laboring under any duress and/or bodily illness; and on the contrary alleges that plaintiff surrendered said policy of insurance No. 1191014 to its agent on March 18, 1927, voluntarily, and over the protest of defendant's agent in the City of San Diego. Defendant further alleges that at the time said policies of insurance were surrendered to it by plaintiff, plaintiff was fully informed as to his rights under said policy and/or policies as to any and all benefits which would accrue to him thereunder.

-VI-

Defendant denies that plaintiff had been informed by the physicians who were in attendance upon him during the illness alleged in plaintiff's bill that the nature of the illness and/or disease with which he was then suffering was pneumonia and pleurisy with effusions. Defendant denies that plaintiff continued in said belief, or any belief, as he was so advised by his said physicians to on or about July 6, 1927, or any other time. Denies that plaintiff was not aware of his true condition and/or the true and/or exact nature of his said illness and/or disease and/or that he at that time or at any time was theretofore suffering with pulmonary tuberculosis and/or that he had been and/or would be totally and/or permanently disabled from engaging in any occupation for remuneration or profit until on or about July 6, 1927.

Defendant denies that at said time as alleged in said paragraph plaintiff was suffering from pulmonary tuberculosis.

Denies that plaintiff upon being examined by a physician other than the ones in attendance upon him was then informed for the first time, or at all, that his disease was pulmonary tuberculosis and not pneumonia and/or pleurisy with effusions, or that theretofore plaintiff had been led to believe that he was suffering with pneumonia and/or pleurisy with effusions. Denies that plaintiff was stricken with said or any pulmonary tuberculosis on July 31, 1926, the date of his first confinement to his bed, as alleged, or at all.

Denies that the failure of plaintiff at any time to have possession of said policy of insurance No. 1191014 was due to any fraud and/or duress practised on plaintiff by defendant or any agent of defendant. Denies that plaintiff was in complete ignorance, or any ignorance, of the terms and/or requirements of said policy of insurance relative to notices and/or proofs to be furnished to defendant in the event of total and permanent disability. Denies that plaintiff did not become aware of the requirements in said policy of insurance relative to notices and proofs in the event of total and permanent disability until on or about April 10, 1929.

-VII-

Defendant admits that it refused to pay plaintiff disability benefits under policy No. 1191014 for the reason that no payments thereunder were due in accordance with the terms and/or provisions of said policy of insurance.

Denies that said policy of insurance was in force and/or was effective at the time of plaintiff's alleged illness as aforesaid, or at all.

Alleges that on March 26, 1929, that being the date upon which the letter of plaintiff constituting his first claim for disability benefits under the provisions of policy No. 1191014 was received by defendant, said policy of insurance No. 1191014 was no longer in force; that said policy of insurance had lapsed for nonpayment of premiums; that plaintiff had theretofore executed a form or surrender of said policy on or about March 18, 1927, and had given up all rights under said policy, in consideration of the return to plaintiff of his unpaid note for $275.60 hereinbefore referred to, and the release of liability under said note for premiums for any period after said surrender.

Denies that it refused to permit plaintiff to file any claim for disability.

-VIII-

Denies that plaintiff has fully performed, or performed at all, all conditions of said policy of insurance on his part to be performed, and alleges that plaintiff has failed to pay the premiums falling due under the terms of said policy of insurance No. 1191014 upon October 14, 1926, and upon October 14, 1927.

Defendant further alleges that said policy of insurance No. 1191014 lapsed by reason of non-payment by plaintiff of the above premiums.

Denies that there is now due, owing and unpaid by it to plaintiff the sum of Thirty-seven Hundred Dollars ($3700.00) or any sum whatsoever, with interest thereon as of September 1, 1929, or any other time and/or thereafter at the rate of One Hundred Dollars ($100.00), or any amount, per month, during the period of plaintiff's disability, as alleged, or at all.

FURTHER ANSWERING THE FIRST CAUSE OF ACTION IN PLAINTIFF'S BILL DEFENDANT moves the court to dismiss said bill of plaintiff and the proceedings herein for all of the reasons hereinbefore set forth; and for the further reasons and upon the grounds that said bill does not state facts sufficient to entitle plaintiff to any relief because

(a) Said bill does not by its face and averments therein contained offer to do equity on the part of plaintiff; and

(b) That the cause of action, if any, sued upon therein is barred by the laches of plaintiff.

AS ANSWER TO THE FURTHER AND SECOND CAUSE OF ACTION SET FORTH IN PLAINTIFF'S BILL DEFENDANT ADMITS, ALLEGES AND DENIES AS FOLLOWS:

-IX-

Admits the allegations contained in Paragraph IX of said bill.

-X-

Admits that on or about November 27, 1925, at the City of San Diego, County of San Diego, State of California, plaintiff made, executed and delivered to defendant his certain promissory note in the sum of Five Hundred Fifty-one and 20/100 Dollars ($551.20), bearing interest at the rate of 6% per annum, on account, among other things, of the first annual premium under policy No. 1196774 issued by it on plaintiff's life in the sum of Fifteen Thousand Dollars ($15,000.00); denies that said note was received in payment of said premium.

Defendant alleges that the giving of said note was only conditional payment of the said premium and that the failure of plaintiff to pay said note when due or at any time thereafter breached the condition. Defendant further alleges that it never received any payment in cash or otherwise from or for the benefit of plaintiff on account of the premium upon said policy of insurance No. 1196774.

-XI-

Defendant alleges that its said policy of insurance No. 1196774 contained a provision for certain benefits in the event of total and permanent disability of plaintiff, but alleges that paragraph XI of plaintiff's bill contains an inaccurate statement of the provisions of said policy for benefits by reason of permanent and total disability of the insured, a copy of which said policy, made from original records, is hereto attached marked Exhibit "B" and made a part hereof.

Defendant denies that its agreement was "that should plaintiff become totally and permanently dieabled before the age of the insured on his nearest birthday is 60 years the defendant company will pay to the plaintiff a monthly income of 1% of the face of the policy, to-wit, the sum of One Hundred Fifty Dollars ($150.00) monthly from the beginning of such total and permanent disability", or as alleged in plaintiff's bill; and upon the contrary alleges that in section 4 of said policy, Exhibit "B", it agreed to pay to the insured a monthly income, namely, 1% of the face amount of the policy if the insured became totally and permanently disabled before the policy anniversary on which the insured's age was sixty (60) years, said income to start upon the date of receipt by the company

at its home office, during the insured's lifetime, of due proof of total and permanent disability. Defendant further alleges that it was agreed by the terms of said policy of insurance that all disability benefits should terminate upon default in the payment of any premiums.

Defendant denies that the agreement set forth in the policy was "in the event of such total and permanent disability of the plaintiff to continue such policy of insurance in force and waive the payment of further premiums thereunder during the continuance of such permanent and total disability" as alleged in plaintiff's bill; and upon the contrary alleges that by the terms of said policy, Exhibit "B", it agreed to waive the payment of any premiums falling due after the receipt of due proof of total and permanent disability of the insured and during the continuance of the total and permanent disability of the insured.

-XII-

As answer to Paragraph XII of plaintiff's bill, defendant denies that the giving of the said promissory note and/or the acceptance of the same caused plaintiff to be insured under said policy for a period of one year from November 27, 1925, plus the grace period of 31 days thereafter; and upon the contrary alleges that the giving and acceptance of such note was only conditional payment of the said premium and that the failure of plaintiff to pay said note when due or at any time thereafter breached the condition. Defendant alleges that it never received anything in cash or otherwise on account of said policy of insurance and/or said note.

Denies that before the next policy anniversary and/or before the sixtieth anniversary of the age of the insured and/or on July 31, 1926, plaintiff was taken and/or be-

came ill with a bodily ailment and/or disease, to-wit, pulmonary tuberculosis. Denies that plaintiff was confined to his bed for a period of nine weeks from said last mentioned date and/or was confined to his home from said time to about April 9, 1927, when plaintiff was again confined to his bed and was compelled to remain therein from said last mentioned date to the latter part of August, 1927. Denies that in consequence of said illness and/or disease became, was and/or is permanently and/or totally disabled from engaging in any occupation whatsoever for remuneration or profit.

Denies that said disease, or any disease, independently from all other causes and within the terms of said contract of insurance has resulted in permanent disability, wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from July 31, 1926, continuing to date hereof. Denies that such incapacity, or any incapacity, due to such illness or any illness and/or disease as alleged by plaintiff, or at all, will continue for an indefinite period, or any period, in the future.

-XIII-

Defendant denies that plaintiff becaise of illness was unable to follow or engage in any occupation for remuneration or profit. Denies that plaintiff was unable to pay said promissory note dated November 25, 1925. Denies that on innumerable occasions between November 25, 1926 and December 30, 1926, its agent and/or representative called plaintiff by telephone and/or visited him at his home while plaintiff was confined to his home and/or his bed for such illness, or any illness and/or disease, and insisted upon payment of said note or the return

and/or surrender to said agent of said policy of insurance. Denies that said calls by said agent and/or representative were constant and/or continuous during said period. Denies that his, or anyone's strenuous insistence upon the payment and/or return of the policy of insurance was a source of great annoyance and/or harrassment to plaintiff as well as worry and/or caused plaintiff's condition to become more serious and/or dangerous. Denies that plaintiff was advised by his physicians in attendance to refrain from worry and/or annoyance. Denies that to rid himself of the constant and/or repeated calls and/or demands of defendant's said agent and/or representative for the return of said policy of insurance and/or the annoyance, harassment and/or worry incident thereto, plaintiff, at the strenuous insistence, or any insistence of defendant's said agent and/or representative and/or for the purpose of securing relief from him surrendered said policy of insurance to said defendant's said agent and/or representative aforesaid. Defendant admits that on December 30, 1926, plaintiff surrendered said policy of insurance No. 119677+ to defendant's agent, and alleges that such surrender was voluntary on the part of plaintiff and was not caused by worry and/or annoyance brought about by the conduct of defendant or defendant's agents.

Defendant further alleges that said policy of insurance No. 1196774 lapsed for non-payment of premiums on December 28, 1926, two days prior to the date upon which said policy of insurance was surrendered.

Denies that at the time of such surrender, or any surrender, of said policy of insurance as alleged, or at all, it or its said agent and/or representative well knew, or knew at all, that plaintiff was suffering from pulmonary tuber-

culosis. Denies that it or its said agent knew plaintiff was covered and/or protected by said policy of insurance and was and/or would be entitled to the benefits mentioned therein and provided therein. Denies that it fraudulently and for the purpose of deceiving plaintiff and/or fraudulently depriving or attempting to deprive plaintiff of his rights under said policy of insurance, advised plaintiff that said policy of insurance had lapsed and that he was no longer insured by virtue thereof or entitled to the benefits therein recited.

Denies that it fraudulently and/or wrongfully procured the release and/or surrender of such policy of insurance; denies that plaintiff at said time, or any time, and/or for a long time thereafter was ignorant of the true nature, or any nature of his d*ie*ases and/or was not aware of the fact that he was suffering with pulmonary tuberculosis and denies that it or its agent and/or representative knew at any time plaintiff was suffering with pulmonary tuberculosis.

-XIV-

As answer to Paragraph XIV of plaintiff's bill defendant denies that plaintiff had been informed by any physician that the nature of the illness and/or disease with which he was then suffering was pneumonia and/or pleurisy with effusions; denies that plaintiff continued in said belief or any belief to on or about July 6, 1927, and was not aware of his true condition and/or the true and/or exact nature of his said illness and/or disease. Denies that plaintiff was ignorant that he at that time and/or theretofore was suffering with pulmonary tuberculosis. Denies that plaintiff had been or would be totally and/or permanently disabled from engaging in any occupation for

remuneration or profit until on or about July 6, 1927, when upon being examined by a physician other than the ones in attendance upon him plaintiff was informed for the first time that his disease was pulmonary tuberculosis and not pneumonia and pleurisy with effusions; denies that plaintiff was stricken with pulmonary tuberculosis upon July 31, 1926, the date of his first confinement to his bed, or any other time.

Denies that the failure of plaintiff at any time to have possession of policy No. 1196774 was due to any fraud and/or duress practised upon plaintiff by defendant or any of its agents. Denies that plaintiff was in complete ignorance of the disability features mentioned and/or contained in said policy of insurance, and/or was unaware of the requirements of said policy of insurance relative to notices and/or proofs to be furnished to defendant corporation in the event of total and/or permanent disability of plaintiff. Denies that plaintiff first became aware of the requirements of said policy of insurance relative to notices and/or proofs on or about April 10, 1929, as alleged in plaintiff's bill, or at all.

-XV-

Defendant denies that policy No. 1196774 was in full force and effect at the time plaintiff requested blanks from defendant for the purpose of filing his claim for total and/or permanent disability upon March 26, 1929, and alleges that long prior thereto the said policy of insurance had lapsed for non-payment of premiums, no cash ever having been paid by plaintiff under said policy, and that because of such non-payment of premiums the provision for disability benefits had automatically terminated in

accordance with the terms of the policy, a true copy of which is hereto attached, marked Exhibit "B".

Defendant admits that it refused to pay to plaintiff disability benefits under said policy No. 1196774, for the reason that no payments thereunder were due under the terms of said policy contract. Defendant alleges that on March 26, 1929, the date upon which the letter of plaintiff constituting his first claim for disability benefits under said policy of insurance was received by defendant, the said policy of insurance No. 1196774 was no longer in force for the reason that said policy had lapsed for non-payment of premiums, and plaintiff, by execution of a form of surrender upon the 30th day of December, 1926, had given up all rights under said policy of insurance in consideration of the return to him of his unpaid note for $551.20 hereinbefore referred to, and the release of liability under said note for premiums for any period after such surrender.

-XVI-

Defendant denies that plaintiff has duly performed, or performed at all all the conditions of said policy of insurance No. 1196774 on the part of plaintiff to be performed, and alleges that the plaintiff has refused to pay the premiums falling due under the terms of said policy upon November 27, 1925, and November 27, 1926. Defendant alleges that said policy of insurance lapsed by reason of non-payment by the plaintiff of the above premiums, and defendant further alleges that plaintiff, by execution of a form of surrender upon December 30, 1926, had given up any and all rights under said policy of insurance in consideration of the return to plaintiff of his unpaid note for $551.20 hereinbefore referred to, and release of lia-

bility under said note for premiums for any period after such surrender. Defendant denies that there is now due, owing and unpaid from defendant to plaintiff the sum of Fifty-five Hundred Fifty Dollars ($5,550.00), together with interest thereon as of September 1st, 1929, or any other sum and/or thereafter at the rate of One Hundred Fifty Dollars ($150.00) per month during the period of plaintiff's alleged disability.

FURTHER ANSWERING THE SECOND CAUSE OF ACTION IN PLAINTIFF'S BILL DEFENDANT

moves the court to dismiss said bill of plaintiff and the proceedings herein for all of the reasons hereinbefore set forth, and for the further reasons and upon the grounds that said bill does not state facts sufficient to entitle plaintiff to any relief because

(a) Said bill does not by its face and averments therein contained offer to do equity on the part of plaintiff; and

(b) That the caise of action, if any, sued upon therein is barred by the laches of plaintiff.

AS ANSWER TO THE THIRD AND FURTHER CAUSE OF ACTION CONTAINED IN PLAINTIFF'S BILL DEFENDANT ADMITS, ALLEGES AND DENIES AS FOLLOWS:

-XVII-

As answer to Paragraph XVII of plaintiff's bill, defendant admits the allegations contained therein.

-XVIII-

Defendant admits that on or about November 27, 1925, plaintiff delivered to defendant his note for Five Hundred

Fifty-one and 20/100 Dollars ($551.20, on account, among other things, of the first annual premium under Policy No. 1196773 issued by defendant on plaintiff's life in the sum of Five Thousand Dollars ($5,000.00). Defendant denies that such note was received by it in payment of such premium, and upon the contrary alleges that the giving of said note was only conditional payment and that the failure of plaintiff to pay such note when due or at any time thereafter breached the condition. Defendant further alleges that it never received any payment in cash or otherwise from plaintiff on account of Policy No. 1196773 and/or said promissory note aforesaid.

-XIX-

Defendant alleges that its agreement under the terms of said policy No. 1196773 to waive the payment of premiums in the event of the total and permanent disability of the insured has been inaccurately stated by plaintiff in Paragraph XIX of plaintiff's bill. Defendant alleges that by the terms of said policy of insurance No. 1196773, a copy of which said policy, made from original records, is hereto attached, marked Exhibit "C" and made a part hereof, it agreed to waive the payment of any *preminus* falling due after receipt of due proof by it of total and *permant* disability of plaintiff and during the continuance of such total and permanent disability of the insured, and it was further agreed that this benefit should automatically terminate upon default in the payment of any premiums under said policy of insurance.

-XX-

Defendant denies, for the reasons stated hereinbefore, in Paragraph XVIII, that the giving of the note never

paid by the plaintiff caused plaintiff to be insured under said policy of insurance No. 1196773, for a period of one year from November 27, 1925, plus the grace period of 31 days thereafter. Defendant denies that before the next policy anniversary and/or before the policy anniversary on which the age of the insured at his nearest birthday is sixty years, and, to-wit, July 31, 1926, plaintiff was taken sick and/or became ill with a bodily ailment and/or disease, to-wit, pulmonary tuberculosis and/or confined to his bed for a period of nine weeks from said last mentioned date and/or confined to his home from said time to about April 9, 1927, when plaintiff was again confined to his bed and was compelled to remain therein from said last mentioned date to the latter part of August, 1927. Denies that in consequence of such alleged illness and/or disease plaintiff became, was and/or is permanently and/or totally disabled from engaging in any occupation whatsoever for remuneration or profit; denies that said disease independent from all other causes and/or within the terms of said contract of insurance has resulted in permanent disability, wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from said July 31st, 1926, continuing to date hereof; denies that plaintiff, due to said illness and/or disease aforesaid, will be incapacitated for an indefinite period in the future, or any period.

-XXI-

Defendant denies that plaintiff, because of illness, was unable to follow or engage in any occupation for remuneration or profit; defendant denies that plaintiff was unable to pay the promissory note dated November 25, 1925.

Defendant admits that on December 30, 1926, plaintiff surrendered said policy of insurance No. 1196773 to defendant's agent, and alleges that said surrender was voluntary on the part of plaintiff, and was not caused by worry and/or annoyance brought about by the conduct of defendant or defendant's agent.

Defendant further alleges that said policy No. 1196773 lapsed for non-payment of premiums on December 28, 1926, two days prior to the date on which said policy of insurance was surrendered.

Defendant denies that in innumerable occasions between November 25, 1926, and December 30, 1926, defendant's agent and/or representative called plaintiff by telephone and/or visited him at his home while plaintiff was confined to his home and/or his bed, with said illness, or any illness and/or disease, and/or insisted upon payment of said promissory note or the return and surrender to said agent of said policy of insurance; denies that said calls by said agent and/or representative were a source of great annoyance and/or harrassment to plaintiff and/or caused plaintiff's condition to become more serious and/or dangerous; denies that plaintiff had been advised by his physicians in attendance to refrain from worry and/or annoyance; denies that plaintiff surrendered said policy of insurance to defendant's agent and/or representative for the purpose of ridding himself of the constant and/or repeated demands and calls of defendant's said agent and/or representative for the return of said policy of insurance and/or because of any annoyance, harrassment and/or worry incidental thereto; denies that at the time of such surrender of said policy of insurance it and/or its agent and/or representative well knew or knew at all

plaintiff was suffering from pulmonary tuberculosis and/or knew plaintiff was covered and/or protected by said policy of insurance and was and/or would be entitled to the benefits therein mentioned and provided.

Denies that it or its said agent and/or representative fraudulently and/or for the purpose of deceiving plaintiff and/or fraudulently depriving or attempting to deprive plaintiff of his said or any rights under said policy of insurance, advised plaintiff that said policy of insurance had lapsed and that plaintiff was no longer insured by virtue thereof or entitled to the benefits thereun recited; denies that plaintiff at said time and/or for a long time thereafter was ignorant of the true nature of his disease and/or was not aware of the fact that plaintiff was suffering from pulmonary tuberculosis; denies that it or its agent and/or representative knew plaintiff was suffering from pulmonary tuberculosis.

-XXII-

Defendant denies that plaintiff had been informed by the physician who had been attending him during his said alleged illness that the nature of said alleged illness with which he was suffering was pneumonia and pleurisy with effusions; defendant denies that plaintiff continued in said belief or any belief to on or about July 6, 1927, or any other time and/or was not aware of his true condition and/or the true and exact nature of his said illness and/or disease. Defendant denies that plaintiff at that time or any time theretofore was suffering with pulmonary tuberculosis and had been totally and/or permanently disabled from engaging in any occupation for remuneration or profit. Defendant denies that on or about July 6, 1927, when upon being examined by a physician other than the

ones in attendance upon him plaintiff was informed for the first time that his disease was pulmonary tuberculosis; defendant denies that plaintiff was stricken with pulmonary tuberculosis on July 31, 1926, or on any other date. Defendant denies that the failure of plaintiff at any time to have possession of policy No. 1196773 was due to any fraud and/or duress practiced upon plaintiff by the defendant or any of its agents.

Defendant denies that because of any fraud and/or duress plaintiff was in complete, or any ignorance of the disability features mentioned and/or contained in said policy of insurance and/or was ignorant that he was entitled to disability benefits thereunder and/or was in complete ignorance, or any ignorance and/or unaware of the requirements of said policy of insurance relative to notices and proofs to be furnished to defendant in the event of total and permanent disability. Defendant denies that plaintiff first became aware of the requirements of said policy of insurance relative to notices and proofs to the defendant in the event of total and permanent disability on or about April 10, 1929.

-XXIII-

Defendant denies that Policy No. 1196773 was in full force and effect at the time plaintiff requested claim blanks from defendant for the purpose of filing his claim for total and permanent disability benefits, to-wit, March 26, 1929, and alleges that long prior thereto the said policy of insurance No. 1196773 lapsed for non-payment of premiums, no cash having ever been paid by the plaintiff under said policy, and that because of such non-payment of premiums the provision for disability benefits had automatically terminated in accordance with the terms

of the policy, a true copy of which said policy, made from original records, is hereto attached marked Exhibit "C". Defendant admits that it refused to waive premiums under Policy No. 1196773, and alleges that the reason for such refusal was that plaintiff was not entitled to such waiver under the terms of said insurance policy.

Defendant admits that on March 26, 1929, the date upon which the letter of plaintiff constituting plaintiff's claim for waiver of premiums under said policy of insurance was received by defendant, said policy of insurance No. 1196773 was no longer in force, since said policy of insurance had lapsed for non-payment of premiums, and for the further reason that plaintiff had executed a form of surrender upon December 30, 1926, and had given up all rights under said policy of insurance in consideration of the return to plaintiff of his unpaid note for $551.20 hereinbefore referred to, and release of liability under said note for premiums for any period after such surrender.

-XXIV-

Defendant denies that plaintiff has duly performed, or performed at all, all the conditions of said policy of insurance No. 1196773 on the part of plaintiff to be performed, and alleges that plaintiff has failed to pay the premiums falling due under the terms of said policy of insurance No. 1196773 on November 27, 1925, and on November 27, 1926.

FURTHER ANSWERING THE THIRD CAUSE OF ACTION IN PLAINTIFF'S BILL DEFENDANT

moves the court to dismiss said bill of plaintiff and the proceedings herein for all of the reasons hereinbefore set forth, and for the further reasons and upon the

grounds that said bill does not state facts sufficient to entitle plaintiff to any relief because

(a) Said bill does not by its face and averments therein contained offer to do equity on the part of plaintiff; and

(b) That the cause of action, if any, sued upon therein is barred by the laches of plaintiff.

FURTHER ANSWERING PLAINTIFF'S BILL AND THE THREE CAUSES OF ACTION THEREIN CONTAINED

defendant moves the court to dismiss said bill of plaintiff and the proceedings herein, for the reason that if any agent and/or purported agent of defendant did threaten or attempt to threaten plaintiff with any prosecution for or on account of any check and/or note as alleged in plaintiff's bill, or at all, the admission of which is only made for the purpose of defense in this separate defense and which is expressly denied in all other particulars, that such agent and/or purported agent was then and there acting beyond the scope of his authority.

WHEREFORE, having answered plaintiff's bill and the three causes of action therein alleged, defendant prays that said bill be dismissed, that plaintiff take nothing, and that defendant go hence with its costs herein incurred, and that it have such other, further and different relief as to the court may seem meet and equitable.

O'MELVENY, TULLER & MYERS, and
J. R. Girling,
Solicitors for defendant.

Address of Solicitors for defendant:
900 Title Insurance Building,
433 South Spring Street,
Los Angeles, California.

STATE OF CALIFORNIA,)
) SS.
COUNTY OF LOS ANGELES.)

J. R. GIRLING being first duly sworn deposes and says:

That he is one of the solicitors for defendant in the above entitled action; that he is authorized to execute and verify the answer of defendant herein; that he makes such verification partly on his personal knowledge and partly on information furnished him by others, all of which he believes to be true and expects to prove on the trial of this action, and that the defendant herein has a full, equitable and just defense to plaintiff's claim, as hereinbefore stated in defendant's answer, and that the within answer and the allegations therein contained are not interposed for delay.

J. R. Girling.

Subscribed and sworn to before me
this 4 day of November, 1929.

Adelia Hawkins [Seal]

Notary Public in and for the County
of Los Angeles, State of California.

My Commission Expires Feb. 7, 1933.

EXHIBIT A

Copy

THE PENN MUTUAL

NUMBER	(Emblem)	AMOUNT
....		10,000.00

"We are met on the broad pathway of good faith and good will."

LIFE INSURANCE COMPANY
OF PHILADELPHIA

Hereby insures the life of

JAMES MC CULLOCH JR.
THE INSURED

and agrees to pay
TEN THOUSAND Dollars,

whenever the reserve on this Policy (according to the Ordinary Life Plan and the American Experience Table of Mortality with interest at 3 per cent.), together with the accumulated surplus then to the credit of this Policy, shall equal the face amount, to James McCulloch, Jr., the insured, which payment shall be in full settlement of all demands against the said Company under this Policy; or if the said insured should die before this Policy matures as above provided, then to pay the said face amount, together with the accumulated surplus to Anna R. McCulloch, his wife, if she survive him, otherwise to his executors, administrators or assigns,

THE BENEFICIARY

upon receipt of due proof of the death of the insured and delivery of this Policy.

The right to change the beneficiary is reserved by the insured.

DOUBLE INDEMNITY BENEFIT

The Company agrees to increase the amount payable to double the face amount stated above upon receipt of due proof that the death of the insured resulted solely from bodily injuries sustained through accidental means before the policy anniversary on which the age of the insured at nearest birthday is seventy years, as provided in section five.

DISABILITY BENEFITS

The Company agrees to pay a monthly income of $100.00 and waive payment of subsequent premiums upon receipt of due proof that the insured has become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years as provided in section four.

DIVIDENDS

Dividends of Surplus under this Policy shall be awarded and may be used as provided in section one.

FULL PAID OPTION

When at the expiration of any policy-year, the accumulated surplus to the credit of this Policy, together with its guaranteed cash surrender value as specified on the second page hereof, shall equal or exceed the net single premium required at the attained age of the insured to make this Policy full-paid, such net single premium to be calculated on the same bases as the net yearly premium on this Policy, then upon proper written application it will be declared a full-paid policy and will participate annually thereafter as such and any excess of these dividends over the amount required for the purpose above described shall then be paid in cash.

PREMIUMS

This contract is made in consideration of the payment in advance to the Company at its Home Office of the sum of Two Hundred Seventy-five & 60/100 Dollars, at the date hereof, and upon condition that the annual premium of Two Hundred Seventy-five & 60/100 Dollars is paid on or before the Fourteenth day of October in every year until the maturity of this Policy, subject to waiver of payment of premiums in event of total and permanent disability.

The annual premium stated above includes Twenty-one & 70/100 Dollars for the Total and Permanent Disability Benefits and Twelve & 50/100 Dollars for the Double Indemnity Benefit and shall be correspondingly reduced upon any termination of such Benefits as provided in sections four and five.

Premium payments may be made annually, or in semi-annual or quarterly instalments at the rates shown on the margin hereof and as provided in section seven.

All the benefits, privileges and provisions stated on the second and third pages hereof form a part of this Policy as fully as though recited at length over the signatures hereto affixed.

IN WITNESS WHEREOF, THE PENN MUTUAL LIFE INSURANCE COMPANY of Philadelphia has caused this Policy to be signed by its President, Secretary and Actuary, attested by its Registrar, at its Home Office in Philadelphia, Pennsylvania, on the date of issue, the Fourteenth day of October 1925.

Sydney A Smith Secretary. Wm A Law President.

Attest:

..............................Registrar. George R. White Actuary.

ORDINARY LIFE RATE ENDOWMENT POLICY—ANNUAL DIVIDENDS—DOUBLE INDEMNITY BENEFIT TOTAL AND PERMANENT DISABILITY BENEFITS PROVIDING FOR WAIVER OF PREMIUM AND MONTHLY INCOME PAYMENT

AGE 32

ANNUAL PREMIUM $275.60

SEMI-ANNUAL PREMIUM $140.60

QUARTERLY PREMIUM $71.70

Examined by G. H. M.

made from Home Office records

I hereby certify that this is a ~~true~~ copy ^ of Policy No. 1191014 issued by The Penn Mutual Life Ins. Co. on the Life of James McCulloch, Jr.

Chas V. Cornell
Asst Supervisor of Applications
and Death Claims

Policy Form No. 6M-12 O. L. R. E. D. I. D. A. Ed. 6, 1924.

Exhibit A

FROM THE DATE OF ISSUE THIS POLICY SHALL BE WITHOUT ANY RESTRICTIONS AS TO TRAVEL OR RESIDENCE

SECTION 1. PARTICIPATION—DIVIDENDS OF SURPLUS

ANNUAL DIVIDENDS. This Policy will participate in surplus while in force by payment of premiums or by waiver of premiums as provided in Section 4. Dividends will be determined and accounted for by the Company and will be available upon payment of the

second year's premium, and at the end of the second and of each subsequent policy-year.

All distributions of surplus awarded to this Policy and remaining in the hands of the Company shall be accumulated at four per cent. per annum, compound interest, or the average net rate realized by the Company upon its assets if it be less; this surplus and interest, increased annually by such addition as may be awarded by the Board of Trustees, will be used to mature this Policy as an Endowment, as provided on the first page hereof, or in event of the death of the insured during the continuance in full force of this Policy, the accumulated surplus will be paid in addition to the face amount of this Policy.

Any accumulated surplus to the credit of this Policy may either be drawn in cash, or used in reduction of premium, or applied to increase the paid-up insurance provided for by the terms of this Policy by the amount of similar paid-up life insurance which the accumulated surplus would purchase at the attained age of the insured according to the present established rates of the Company, provided, however, that if such paid-up insurance shall exceed the face amount of this Policy, satisfactory evidence of insurability must first be furnished to the Company.

If no other option is selected, dividends shall be paid in cash.

POST-MORTEM DIVIDEND. Upon the death of the insured during any policy-year, after the first, while this Policy is in force by payment of premiums or by waiver of premiums as provided in Section 4, the Company will pay a post-mortem dividend for the policy-year current at the date of the insured's death.

SECTION 2. POLICY LOANS

Loans will be available during the third policy-year, if three years' premiums have been paid, and at any time

thereafter while this Policy is in force by payment of premiums or by waiver of premiums as provided in Section 4 and may be obtained on proper assignment and delivery of this Policy and on the sole security hereof. The amount of such loan may be any sum which with interest to the end of the current policy-year will not exceed the cash value at the end of such year less any existing indebtedness on this Policy and any unpaid balance of the current policy-year's premium. The cash value will be the full reserve on this Policy as provided in Section 3 and will be increased by the full reserve on any dividend additions.

The indebtedness or any part thereof may be repaid to the Company at any time.

Interest on loans will be at the rate of 6 per cent. per annum payable at the end of each policy-year. If not paid when due it shall be added to the existing indebtedness provided the total indebtedness on this Policy would not then exceed the cash value plus the full reserve on any dividend additions, and the indebtedness thus created shall bear interest at the same rate.

Failure to repay any such loans or interest thereon shall not void this Policy unless the total indebtedness hereon with interest shall equal or exceed the cash value plus the full reserve on any dividend additions, nor until one month after notice shall have been mailed to the last-known address of the insured and of the assignee, if any, of record at the Home Office of the Company. All indebtedness on account of this Policy, with accrued interest, shall be deducted from any settlement hereunder. The Company shall have the right to defer the making of a loan hereon (unless for the purpose of paying premiums on policies in this Company) for a period of not exceeding ninety (90) days from the date of the application therefor.

SECTION 3. POLICY VALUES—NON-FORFEITURE IN EVENT OF LAPSE

The full reserve on this Policy will be available upon lapse through non-payment of premiums at the end of the third policy-year or at any time thereafter, and may be used as follows:

(1) To extend automatically the face amount of of this Policy as Term Insurance without participation; or,

(2) To purchase paid-up participating life insurance upon proper written application within one month from the date of lapse; or,

(3) To pay the cash value of this Policy upon proper release and delivery of this Policy within one month from the date of lapse.

The following table states such values for completed policy years. These values will be correspondingly increased for any fractional part of a year's premium which has been paid.

The full reserve on any paid-up insurance or extended insurance, less any indebtedness thereon, will be available as a cash value at any time upon proper release and delivery of this Policy.

The cash value will be increased by the full reserve on any dividend additions and diminished by any existing indebtedness; the amount of paid-up insurance shall be increased or diminished in the same proportion as such cash value is increased or diminished; or the extended insurance shall be for the face amount of this Policy less any indebtedness, and for such a term as such adjusted cash value will provide.

The Company shall have the right to defer the payment of any surrender value of this Policy (unless for the purpose of paying premiums on policies in this Com-

pany) for a period of not exceeding ninety (90) days from the date of the application therefor.

The reserve basis of the following table is the American Experience Table of Mortality with interest at 3 per cent. per annum, according to the net level premium method.

Table of Extended Insurance, Paid-up Insurance, and Loan or Cash Values provided for by this Policy

		These Values are for $1000 Insurance For this Policy multiply by TEN	
At End of Year	Term of Automatic Extended Insurance Without Participation	Participating Paid-Up Life Insurance On Surrender	Loan or Cash Surrender Values
3d	4 years 72 days	$ 84	$ 35 17
4th	5 " 241 "	111	47 60
5th	7 " 47 "	139	60 39
6th	8 " 208 "	166	73 54
7th	9 " 344 "	193	87 05
8th	11 " 75 "	220	100 94
9th	12 " 121 "	246	115 19
10th	13 " 115 "	272	129 83
11th	14 " 56 "	298	144 86
12th	14 " 313 "	324	160 27
13th	15 " 158 "	349	176 05
14th	15 " 329 "	374	192 20
15th	16 " 96 "	398	208 72
16th	16 " 197 "	422	225 58
17th	16 " 269 "	446	242 77
18th	16 " 316 "	469	260 25
19th	16 " 340 "	491	278 00
20th	16 " 343 "	513	296 00
25th	16 " 136 "	615	388 81
30th	15 " 66 "	701	483 60

Loans are available during the policy-year as provided in Section 2.

SECTION 4. TOTAL AND PERMANENT DISABILITY BENEFITS; WAIVER OF PREMIUM AND MONTHLY INCOME PAYMENT

MONTHLY INCOME PAYMENT. If the insured shall become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the Company will pay to the insured a monthly income equal to one per cent. of the face amount of this Policy (exclusive of any dividend additions). Said income shall start upon the date of receipt by the Company at its Home Office during the insured's lifetime of due proof of total and permanent disability and continue thereafter for the period of the said total disability of the insured prior to the maturity of this Policy. Interest on any indebtedness under this Policy may be deducted from the monthly income payments hereunder.

WAIVER OF PREMIUM. The Company will waive the payment of any premium falling due after receipt of due proof of total and permanent disability and during the continuance of the said total disability of the insured.

NO DEDUCTION FOR BENEFITS GRANTED. In any settlement under this Policy the Company shall not make any deduction on account of monthly income payments made or premiums waived.

PARTICIPATION. This Policy shall continue to participate in surplus during the period of said total and permanent disability.

INCREASING VALUES. Policy values shall increase from year to year in the same manner as though any premiums waived hereunder had been duly paid in cash.

TOTAL AND PERMANENT DISABILITY. Disability shall be total and permanent if the insured is, upon the receipt of due proof, totally and permanently prevented by bodily injury or disease from engaging in any occupation whatever for remuneration or profit and became so disabled while this Policy was in force by payment of premium. Immediately upon receipt of due proof of such total and permanent disability, the benefits shall become effective, subject to the conditions herein provided. If said total disability has been continuous for not less than three consecutive months immediately preceding the receipt of due proof, such disability, if not already approved as permanent, shall nevertheless be deemed to be permanent and upon the receipt of due proof of such disability the benefits shall become effective, subject to the conditions herein provided.

RECOGNIZED DISABILITIES. Without prejudice to any other cause of disability, the Company will recognize the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot, as total and permanent disability.

RECOVERY FROM DISABILITY. The Company, at any time until Disability Benefits have been effective for two full years, and not oftener than once a year thereafter, may require of the insured due proof of the continuance of such total disability. Upon failure to furnish such proof, or if it appear at any time that the insured has engaged or has become able to engage in any occupation whatever for remuneration or profit, all Dis-

ability Benefits under this Policy, except in the case of recognized disabilities hereinbefore mentioned, shall thereupon cease.

TERMINATION. This provision for Total and Permanent Disability Benefits shall automatically terminate:

(1) Upon default in the payment of any premium;

(2) If this Policy be surrendered for its cash value, or if any paid-up insurance or extended insurance provided for in Section 3 of this Policy become effective;

(3) Upon the policy anniversary on which the age of the insured at nearest birthday is sixty years, or if this Policy mature prior to such policy anniversary, then upon such maturity;

(4) If the insured engage in Military or Naval Service in time of war;

(5) If the disability of the insured result from aeronautic or submarine casualty;

(6) If the disability of the insured be voluntarily self-inflicted.

Upon termination under (4), (5), or (6) above, the liability of the Company under this Total and Permanent Disability Benefits provision shall be limited to the amount of the current unearned premium for such benefits, which shall be returned by the Company upon notice.

Upon any termination of this provision for Disability Benefits, or upon receipt by the Company of proper request for discontinuance thereof, accompanied by this Policy for endorsement, any premium thereafter due shall be reduced by the amount payable for the Disability Benefits stated on the first page of this Policy.

Exhibit A

Exhibit A

SECTION 5. DOUBLE INDEMNITY BENEFIT

The Company will pay a Double Indemnity Benefit equal to and in addition to the face amount of this Policy, upon receipt of due proof that the death of the insured resulted solely from bodily injuries effected directly and exclusively by external, violent and accidental means, and that such death occurred within sixty days after sustaining such injuries. This Double Indemnity Benefit shall not be payable if the death of the insured resulted directly or indirectly from illness or disease of any kind or from physical or mental infirmity; from poison administered whether accidentally or intentionally by the insured or by another; from self-destruction at any time whether sane or insane; from any violation of law by the insured; from aeronautic or submarine casualty; or if the injuries were sustained while performing Military or Naval Service in time of war or riot, or while performing police duty as a member of any Military or Naval or Police organization. The Company shall have the right and opportunity to examine the body and to make an autopsy unless prohibited by law.

This provision for Double Indemnity Benefit shall automatically terminate:

(1) Upon default in the payment of any premium;

(2) If this Policy be surrendered for its cash value, or if any paid-up insurance or extended insurance provided for in Section 3 of this Policy become effective;

(3) Upon the policy anniversary on which the age of the insured at nearest birthday is seventy years, or if this Policy mature prior to such policy anniversary, then upon such maturity.

Upon any termination of this provision for Double Indemnity Benefit or upon receipt by the Company of proper request for discontinuance thereof, accompanied by this Policy for endorsement, any premium thereafter due shall be reduced by the amount payable for the Double Indemnity Benefit stated on the first page of this Policy.

SECTION 6. CHANGE OF BENEFICIARY AND ASSIGNMENT

CHANGE OF BENEFICIARY. Whenever the right to change the beneficiary has been reserved in this Policy or in the last Designation of Beneficiary recorded at the Home Office of the Company, the insured or his duly appointed guardian if he be not of legal age (subject to any previous assignment of this Policy duly filed at the Home Office) shall have full power while this Policy is in force to designate a new beneficiary, with or without reserving the right of future designation, by filing written notice thereof at the Home Office and such change shall take place upon such filing and not before.

Furthermore whenever such right to change has been reserved, the insured shall be entitled without the consent of the beneficiary, to any cash dividends declared on this Policy and to the loan or cash value or paid-up insurance herein provided for.

ASSIGNMENT. Any assignment of this Policy shall be furnished to the Company and a duplicate thereof attached hereto. No assignment shall impose any obligation on this Company until the original thereof has been filed at the Home Office of the Company, nor does the Company guarantee the sufficiency or validity of any assignment.

SECTION 7. PAYMENT OF PREMIUMS

PAYMENT OF PREMIUMS. All premiums are due and payable in advance at the Home Office of the Company in the City of Philadelphia, or they may be paid to agents on or before the dates when due in exchange for receipts signed by the President, a Vice-President, Secretary, Treasurer, or Actuary and countersigned by the agent.

The insurance under this Policy is based upon annual premiums payable in advance; but on any anniversary, upon written request, payments may be made semi-annually or quarterly in advance at the premium rates therefor now in use by the Company. Any unpaid portion of the premium for the policy-year during which the death of the insured occurs will be deducted from the sum payable under this Policy.

GRACE IN PAYMENT OF PREMIUMS. A grace of thirty-one days, during which this Policy shall remain in force, will be granted for the payment of premiums or regular instalments thereof, after the first. If the death of the insured occur during the days of grace, the sum necessary to complete payment of premium for the then current policy-year will be deducted from the amount payable hereunder.

REINSTATEMENT. In the event of default in premium payments, unless the cash value has been duly paid, this Policy may be reinstated at any time upon evidence of insurability satisfactory to the Company and the payment of all overdue premiums and the payment or reinstatement of any other indebtedness to the Company upon said Policy, with interest at the rate of 6 per cent. per annum.

SECTION 8. OTHER PROVISIONS

INCONTESTABILITY. This Policy and the application therefor, a copy of which is attached hereto, constitute the entire contract between the parties. This Policy shall be incontestable after it has been in force during the lifetime of the insured for a period of one year from its date of issue except for non-payment of premiums and except as to provisions relating to Disability and Double Indemnity Benefits. All statements made by the insured or on his behalf shall, in the absence of fraud, be deemed representations and not warranties and no such statement shall avoid or be used in defense under this Policy unless it is contained in the written and printed application and a copy of such application is attached to this Policy when issued.

AGE. Any error in stating the age of the insured shall be adjusted by the Company paying under any of the provisions of this Policy such amount as the premium actually paid would have purchased at the correct age.

SUICIDE. If the insured, whether sane or insane, shall commit suicide within one year from the date of issue of this Policy, the liability of the Company shall be limited to the amount of the premium paid hereon.

ALTERATIONS. No alteration of this Policy, or waiver of any of its conditions shall be valid unless endorsed hereon and signed by an Officer of the Company. No agent is authorized to modify, alter or enlarge this contract or to bind the Company by any promise or undertaking as to distribution of surplus or any future award of interest.

SECTION 9. OPTIONS FOR PAYMENT OF THIS POLICY AS AN INCOME

The insured, subject to any designation of beneficiary or assignment of this Policy filed with the Company, as provided in Section 6, may elect in writing that the net proceeds of this Policy at maturity, or any part thereof, or the cash value before maturity, not less than $1,000, shall be payable according to any of the following options. In such written election no beneficiary entitled to the proceeds of this Policy or any part thereof or any instalment of interest or principal to become due thereon shall have the right to commute, withdraw, surrender, encumber, alienate or assign the same upon any terms whatsoever unless by the written permission of the insured.

The beneficiary entitled to receive the net proceeds when payable, may elect in writing to have the net proceeds payable according to any of the following options, in event of the failure of the insured to do so.

The tables under Options A, B and C are based upon a policy the net proceeds of which are $1,000, and apply pro rata to this Policy, and provide for annual or monthly instalments, first instalment to be paid at maturity or upon proper surrender for cash value. The income may be made payable in equivalent equal semi-annual or quarterly instalments upon proper request; to find the semi-annual instalment, multiply the annual instalment by .5037 and to find the quarterly instalment multiply by .2528.

OPTION A. INCOME FOR ONE TO THIRTY YEARS CERTAIN in annual or monthly instalments as may be elected according to the following table.

Number of Years	1	2	3	4	5	6	7	8
Annual	1000.00	507.39	343.23	261.19	211.99	179.22	155.83	138.31
Monthly	84.50	42.87	29.00	22.07	17.91	15.14	13.17	11.69

Number of Years	9	10	11	12	13	14	15	16
Annual	124.69	113.82	104.93	97.54	91.29	85.95	81.33	77.29
Monthly	10.54	9.62	8.87	8.24	7.71	7.26	6.87	6.53

Number of Years	17	18	19	20	21	22	23	24
Annual	73.74	70.59	67.78	65.26	62.98	60.92	59.04	57.33
Monthly	6.23	5.96	5.73	5.51	5.32	5.15	4.99	4.84

Number of Years	25	26	27	28	29	30
Annual	55.76	54.31	52.97	51.74	50.60	49.53
Monthly	4.71	4.59	4.48	4.37	4.28	4.19

OPTION B. INCOME FOR TWENTY YEARS CERTAIN AND AS LONG THEREAFTER AS THE BENEFICIARY MAY LIVE, in annual or monthly instalments, as may be elected according to the following table.

Age of Beneficiary	10 and under	11	12	13	14	15	16	17
Annual	39.52	39.70	39.89	40.08	40.28	40.49	40.71	40.94
Monthly	3.34	3.35	3.37	3.39	3.40	3.42	3.44	3.46

Age of Beneficiary	18	19	20	21	22	23	24	25
Annual	41.18	41.43	41.69	41.96	42.24	42.53	42.84	43.16
Monthly	3.48	3.50	3.52	3.55	3.57	3.59	3.62	3.65

Age of Beneficiary	26	27	28	29	30	31	32	33
Annual	43.49	43.84	44.21	44.59	44.98	45.39	45.82	46.27
Monthly	3.67	3.70	3.74	3.77	3.80	3.84	3.87	3.91

Age of Beneficiary	34	35	36	37	38	39	40
Annual	46.74	47.23	47.73	48.26	48.80	49.36	49.95
Monthly	3.95	3.99	4.03	4.08	4.12	4.17	4.22

Age of Beneficiary	41	42	43	44	45	46	47	48
Annual	50.55	51.17	51.81	52.46	53.12	53.80	54.50	55.19
Monthly	4.27	4.32	4.38	4.43	4.49	4.55	4.61	4.66

Age of Beneficiary	49	50	51	52	53	54	55	56
Annual	55.89	56.59	57.29	57.98	58.66	59.33	59.97	60.58
Monthly	4.72	4.78	4.84	4.90	4.96	5.01	5.07	5.12

Age of Beneficiary	57	58	59	60	61	62	63	64
Annual	61.17	61.72	62.24	62.71	63.15	63.54	63.89	64.19
Monthly	5.17	5.22	5.26	5.30	5.34	5.37	5.40	5.42

Age of Beneficiary	65	66	67	68	69	70 and over
Annual	64.45	64.67	64.85	64.99	65.09	65.16
Monthly	5.45	5.46	5.48	5.49	5.50	5.51

OPTION C. INCOME FOR TEN YEARS CERTAIN AND AS LONG THEREAFTER AS THE BENEFICIARY MAY LIVE, in annual or monthly instalments, as may be elected according to the following table.

Age of Beneficiary	10 and under	11	12	13	14	15	16	17
Annual	40.62	40.81	41.01	41.23	41.45	41.68	41.92	42.17
Monthly	3.43	3.45	3.47	3.48	3.50	3.52	3.54	3.56
Age of Beneficiary	18	19	20	21	22	23	24	25
Annual	42.43	42.70	42.99	43.29	43.60	43.93	44.27	44.63
Monthly	3.59	3.61	3.63	3.66	3.68	3.71	3.74	3.77
Age of Beneficiary	26	27	28	29	30	31	32	33
Annual	45.01	45.40	45.81	46.25	46.70	47.19	47.69	48.22
Monthly	3.80	3.84	3.87	3.91	3.95	3.99	4.03	4.07
Age of Beneficiary	34	35	36	37	38	39	40	41
Annual	48.77	49.36	49.98	50.63	51.31	52.01	52.74	53.51
Monthly	4.12	4.17	4.22	4.28	4.34	4.39	4.46	4.52
Age of Beneficiary	42	43	44	45	46	47	48	49
Annual	54.27	55.06	55.90	56.78	57.71	58.69	59.72	60.79
Monthly	4.59	4.65	4.72	4.80	4.88	4.96	5.05	5.14
Age of Beneficiary	50	51	52	53	54	55	56	57
Annual	61.92	63.09	64.32	65.60	66.93	68.31	69.73	71.20
Monthly	5.23	5.33	5.44	5.54	5.66	5.77	5.89	6.02
Age of Beneficiary	58	59	60	61	62	63	64	65
Annual	72.72	74.27	75.85	77.45	79.07	80.70	82.32	83.93
Monthly	6.14	6.28	6.41	6.54	6.68	6.82	6.96	7.09
Age of Beneficiary	66	67	68	69	70	71	72	73
Annual	85.52	87.07	88.57	90.02	91.40	92.70	93.91	95.02
Monthly	7.23	7.36	7.48	7.61	7.72	7.83	7.94	8.03
Age of Beneficiary	74	75	76	77	78	79	80 and over	
Annual	96.02	96.90	97.76	98.59	99.38	100.02	100.52	
Monthly	8.11	8.19	8.26	8.33	8.40	8.45	8.49	

The income under Option A or the income during the instalments-certain period under Option B or C, after the first year, will be increased annually by such surplus as may be awarded by the Board of Trustees. Upon the death of any beneficiary, any unpaid instalments under Option A or unpaid instalments-certain under Option B or C, or the commuted value thereof, calculated upon the basis of 3 per cent. per annum compound interest, will be paid as agreed upon in the election of the option.

Options B and C are based on the age of the beneficiary at last birthday and are not available when an association, firm or corporation is beneficiary or assignee.

OPTION D. INTEREST INCOME ON THE NET PROCEEDS payable for such a period as may be agreed upon in the election of this option.

OPTION E. INCOME OF A FIXED AMOUNT PAYABLE UNTIL THE NET PROCEEDS AND INTEREST PAYMENTS TO BE ADDED THERETO ARE EXHAUSTED, the final payment to be the balance then remaining with the Company.

Under Options D and E, the net proceeds are left with the Company at interest at the rate of 3 per cent. per annum, increased annually by such additions as may be awarded by the Board of Trustees, and the income may be made payable annually or in equivalent equal semi-annual, quarterly or monthly payments commencing at the end of the first interest period, with a further payment for the period elapsing between the last regular payment and the date of death of the beneficiary. Payments of principal and interest shall be subject to such provisions as may be agreed upon in the election of either of these options.

Exhibit A

No. 6M-12

[Stamped on face]: Disability Claim Examined.

1191014
No.Ed. 3-24

APPLICATION FOR INSURANCE IN
THE PENN MUTUAL LIFE INSURANCE COMPANY
OF PHILADELPHIA, PA.

1 A. Name in Full (please print)
James McCulloch Jr.

B. Residence Address

No. Street	City	County	State
4275 Ingleside Ave,	San Diego,		Calif.

C. If in County

....Miles.... Direction
R.F.D. From Above City.

How Long Have You Resided at Present Address?
9 Years

D. Business Address

No. Street	City	County	State
914 Beech	San Diego,		Calif

E. Send Premium Notices to
914 Beech St. San Diego, Calif.

4 A. When and Where Were you Born?

Place	County	State
Baltimore		Md.

B.

Day	Month	Year	Age Nearest Birthday
6	Dec.	1893	32

5. Are You (Indicate by X)
Married X Single.... Widower.... Widow....

6 A. What Other Insurance Have You on Your Life?

Company		Amount
Metropolitan	20 Pay Life	16,000.00
Acasia	" " "	5,000.00

F. If Married Woman, Give
Maiden Name Husband's Name

G. Places of Residence Last Five Years
San Diego, Calif.

H. Do You Intend to Change Residence or Travel Outside the U. S.? (Give Details)
No.

I. Are You Engaged in Military or Naval Service?
No
Do You Intend so to Engage?
No

J. Are You Engaged in Aeronautics or Submarine Service?
No
Do You Intend so to Engage?
No

2 A. Occupation (State Kind of Business)
Proprietor and Superintendent McCulloch Hospital

B. Occupation During the Last Five Years
As Above

C. Any Change of Occupation Contemplated, Either Temporary or Permanent? (Give Details) No

B. Have You Ever Applied to Any Company or Agent Without Receiving a Policy of the Exact Kind and Amount Applied for? No

C. Are Any Applications Now Pending (Give Details) No

7 A. Sum to Be Insured
$10,000.00
B. Plan
OLRE

C. Premiums Payable
√Annually
Semi-Annually
Quarterly

D. If Disability Benefits Desired, Indicate by X
Disability Waiver of Premium ....
Disability Waiver of Premium and Annuity X
Double Indemnity X

8. How is Surplus to Be Used?
(Rule out Those Not Desired)
To Reduce Premiums
To Increase Amount Insured

3 A. To Whom Shall Policy Be Made Payable? Anna R. McCulloch
If Said Beneficiary Outlives me, Otherwise to My Estate

B. Address San Diego, Cal. 4275 Ingleside Ave.

C. Relationship Wife

D. Beneficiary's Date of Birth June 1st, 1893

E. Do you Reserve the Right to Change Beneficiary? Yes

F. If Beneficiary Is Married Woman, State Maiden Name Rogan Husband's Name

To Accumulate at 3% Interest
√To Accelerate Maturity

9. What Settlement, If Any, Was Effected for Premium on Policy Hereby Applied For? Note

Remarks (Use This Space for Beneficiary Provisions, Preliminary Term Premiums, Etc.)

....

....

For Home Office Endorsements Only

....

[On Margin]: NOTICE—THE FULL NAMES of all persons must be written and signed plainly and distinctly. Names must not be abbreviated. Every question must be fully answered. When a Creditor insures the life of a Debtor, both must sign.

My statements and answers to the questions printed above, and my statements and answers made and given to the Company's Medical Examiner, are full, complete and true. Upon them I base my application for insurance, and agree that they shall be regarded as a part of

the contract if and when issued. If the premium on the insurance herein applied for is not paid at the time of making this application, the contract of insurance shall not be in force unless or until a policy shall be issued and delivered to me and the first premium thereon actually paid during my lifetime and good health. If settlement is effected in accordance with the attached receipt at the time of making this application, the policy shall be in force as of the date of such settlement, provided the application is approved by the Company at the Home Office. The policy if and when issued and delivered to me, shall be in the form now in use by the Company. I understand that neither agents nor examiners have any authority to modify, alter or enlarge contracts. The foregoing agreements and declarations are made on behalf of myself and of any beneficiary under any policy on my life issued by the Company upon this application. 130473 to 130475

My acceptance of any policy issued on this application will constitute a ratification by me of any correction in or addition to this application made by the Company and noted in the space provided for "Home Office Endorsements Only."

In Witness Whereof, the applicant has hereunto subscribed his name. Dated at San Diego the 29 day of September 1925

Witness Present:
Don C. Carrell

Signature of the person proposed for insurance. James McCulloch, Jr.
Sign the Names in full.

No. 434230

QUESTIONS TO BE ANSWERED BY THE PERSON TO BE INSURED

Name of Applicant James McCulloch Jr. Examined 11 A. M. This 30th Day of Sept. 1925.
(Write name in printed letters)

At San Diego, County of San Diego State of Calif. Residence 4275 Ingleside

Do you Contemplate Any Change of Residence or Occupation? No Date of Birth? Dec. 6, 1893 Name of Agent? D. C. Carrell Henking & Randolph

10. A.	Age if Living	State of Health	Age at Death	Cause of Death	Duration of Fatal Illness
Father	89	Good			
Mother			57	(Gall Bladder√ (Acidosis from (Operation	3 days√
Full Brothers { How Many Living 2 / " " Dead? 0	17-29	Both Good			
Full Sisters { How Many Living 1 / " " Dead 0	27	Good			

Wife or Husband's Age If Living	State of Health	Age at Death	Cause of Death
31	Good	—	—

Ages Attained:	Father's Father	Father's Mother	Mother's Father	Mother's Mother
	D.K.	D.K.	D.K.	D.K.

(B) Has any near relative, uncles, aunts and grandparents included, had tuberculosis (consumption), cancer, apoplexy or Bright's disease. Explain fully. No.

If the family history shows a lack of longevity, give number and ages of uncles and aunts. See Note 6.

Question	Answer
11 A. Are you now in good health? B. When were you last attended by a physician or consulted one? C. For what disease?	A. Yes. B. 1920. C. Crushed lt. middle finger
D. Give details in full.	D. Caught finger in bearing of auto.
E. Give name and residence of the physician who attended you.	E. Dr. Mott Arnold. Front & Spruce Sts., City
F. Give name and residence of your medical adviser, or family physician, to whom you now refer for a certificate, if deemed necessary.	F. None
G. Has any physician ever given an unfavorable opinion of your insurability after either a formal or an informal examination?	G. No
H. Has any physician ever advised you to try a change of climate?	H. No
12. A. Have you ever been ruptured? B. Have you a hernia now? C. If so, do you now wear a suitable truss? D. Do you agree to wear one while insured in this company? Note 7.	A. No B. No C. — D. Yes—if necessary

Question	Answer	
13. A. Do you now use intoxicating liquors?	A. No	B. None
B. To what extent?		
C. Have you ever used intoxicating liquors to excess? If so, explain the duration and extent of excess, and when last.	C. No	
D. Have you ever taken a cure for inebriety? Note 6.	D. No	
14. Have you ever used opium, morphia, chloral or any narcotic, unless regularly prescribed by a physician? If so, explain fully.	No	
15. A. Have you had insanity, apoplexy, palsy, vertigo, convulsions, sunstroke, congestion, inflammation, or any other disorder of the brain or nervous system?	A. No	
B. Have you had asthma, consumption, spitting of blood, habitual cough and expectoration, palpitation, or any disease of the throat, heart or lungs?	B. No	
C. Have you had appendicitis, indigestion, biliousness, cancer, or any tumor, pellagra, chronic diarrhoea, ear discharge, dropsy, fistula, gall-stones or gravel,	C. No	

Question	Answer
renal or hepatic colic, open sores, inflammatory rheumatism, gout, syphilis or stricture, or any disease of the liver, kidneys, or bladder? Notes 8 and 9.	
D. Have you any defect in hearing, in vision of either eye, any malformation or varicose veins?	D. No
E. Are you now, or have you recently been associated with a person who has or has had consumption?	E. No
16. Have you ever had illness, disease, injury or operation other than as stated by you above? If so, give full particulars, date, duration, severity, etc., of each. Use reverse side if necessary.	Yes, fract. rt. forearm—both bones above wrist—complete recovery.

I Hereby Agree, That all the foregoing statements and answers, made to the Company's Medical Examiner, are a part of my application for insurance, are declared to be full, complete and true, and are offered to the Company as a consideration for the Contract.

Witnessed by the Examiner H. S. Anderton, M. D. Signature of the person proposed for insurance James McCulloch, Jr.

[On Cover]: COPY

No.................

THE
PENN MUTUAL LIFE
INSURANCE COMPANY
PHILADELPHIA

NAME OF INSURED

JAMES MC CULLOCH, JR.

ORDINARY LIFE RATE
ENDOWMENT POLICY

ANNUAL DIVIDENDS

DOUBLE INDEMNITY BENEFIT
TOTAL AND PERMANENT
DISABILITY BENEFITS

PROVIDING FOR
WAIVER OF PREMIUM AND
MONTHLY INCOME PAYMENT

Amount, $10,000.00

Date of Policy, October 14th 1925

Yearly Payment, $275.60
During the Continuance of this Policy
Payable..Annually
Due the 14th day of October

EXHIBIT B

Copy

THE PENN MUTUAL

NUMBER	(Emblem)	AMOUNT
....		15,000.00

"We are met on the broad pathway of good faith and good will."

LIFE INSURANCE COMPANY
OF PHILADELPHIA

Hereby insures the life of

JAMES MCCULLOCH JR.
THE INSURED

and agrees to pay
FIFTEEN THOUSAND Dollars,

whenever the reserve on this Policy (according to the Ordinary Life Plan and the American Experience Table of Mortality with interest at 3 per cent.), together with the accumulated surplus then to the credit of this Policy, shall equal the face amount, to James McCulloch, Jr., the insured, which payment shall be in full settlement of all demands against the said Company under this Policy; or if the said insured should die before this Policy matures as above provided, then to pay the said face amount, together with the accumulated surplus to Anna R. McCulloch, his wife, if she survive him, otherwise to his executors, administrators or assigns,

THE BENEFICIARY

upon receipt of due proof of the death of the insured and delivery of this Policy.

The right to change the beneficiary is reserved by the insured.

DOUBLE INDEMNITY BENEFIT

The Company agrees to increase the amount payable to double the face amount stated above upon receipt of due proof that the death of the insured resulted solely from bodily injuries sustained through accidental means before the policy anniversary on which the age of the insured at nearest birthday is seventy years, as provided in section five.

DISABILITY BENEFITS

The Company agrees to pay a monthly income of $150.00 and waive payment of subsequent premiums upon receipt of due proof that the insured has become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years as provided in section four.

DIVIDENDS

Dividends of Surplus under this Policy shall be awarded and may be used as provided in section one.

FULL PAID OPTION

When at the expiration of any policy-year, the accumulated surplus to the credit of this Policy, together with its guaranteed cash surrender value as specified on the second page hereof, shall equal or exceed the net single premium required at the attained age of the insured to make this Policy full-paid, such net single premium to be calculated on the same bases as the net yearly premium on this Policy, then upon proper written application it will be declared a full-paid policy and will participate annually thereafter as such and any excess of these dividends over the amount required for the purpose above described shall then be paid in cash.

PREMIUMS

This contract is made in consideration of the payment in advance to the Company at its Home Office of the sum of Four Hundred Thirteen & 40/100 Dollars, at the date hereof, and upon condition that the annual premium of Four Hundred Thirteen & 40/100 Dollars is paid on or before the Twenty-seventh day of November in every year until the maturity of this Policy, subject to waiver of payment of premiums in event of total and permanent disability.

The annual premium stated above includes Thirty-two & 55/100 Dollars for the Total and Permanent Disability Benefits and Eighteen & 75/100 Dollars for the Double Indemnity Benefit and shall be correspondingly reduced upon any termination of such Benefits as provided in sections four and five.

Premium payments may be made annually, or in semi-annual or quarterly instalments at the rates shown on the margin hereof and as provided in section seven.

All the benefits, privileges and provisions stated on the second and third pages hereof form a part of this Policy as fully as though recited at length over the signatures hereto affixed.

IN WITNESS WHEREOF, THE PENN MUTUAL LIFE INSURANCE COMPANY of Philadelphia has caused this Policy to be signed by its President, Secretary and Actuary, attested by its Registrar, at its Home Office in Philadelphia, Pennsylvania, on the date of issue, the Fourteenth day of October 1925.

Sydney A Smith Secretary. Wm A Law President.

Attest:

..............................Registrar. George R. White Actuary.

ORDINARY LIFE RATE ENDOWMENT POLICY—ANNUAL DIVIDENDS—DOUBLE INDEMNITY BENEFIT TOTAL AND PERMANENT DISABILITY BENEFITS PROVIDING FOR WAIVER OF PREMIUM AND MONTHLY INCOME PAYMENT

AGE 32

ANNUAL PREMIUM $413.40

SEMI-ANNUAL PREMIUM $210.90

QUARTERLY PREMIUM $107.55

Examined by M. C. F.

made from Home Office records

I hereby certify that this is a ~~true~~ copy ^ of Policy No. 1196774 issued by The Penn Mutual Life Ins. Co. on the Life of "James McCulloch, Jr."

Chas V. Cornell
Asst Supervisor of Applications
and Death Claims

Policy Form No. 6M-12 O. L. R. E. D. I. D. A. Ed. 6, 1924.

Exhibit B

FROM THE DATE OF ISSUE THIS POLICY SHALL BE WITHOUT ANY RESTRICTIONS AS TO TRAVEL OR RESIDENCE

SECTION 1. PARTICIPATION—DIVIDENDS OF SURPLUS

ANNUAL DIVIDENDS. This Policy will participate in surplus while in force by payment of premiums or by waiver of premiums as provided in Section 4. Dividends will be determined and accounted for by the Company and will be available upon payment of the

second year's premium, and at the end of the second and of each subsequent policy-year.

All distributions of surplus awarded to this Policy and remaining in the hands of the Company shall be accumulated at four per cent. per annum, compound interest, or the average net rate realized by the Company upon its assets if it be less; this surplus and interest, increased annually by such addition as may be awarded by the Board of Trustees, will be used to mature this Policy as an Endowment, as provided on the first page hereof, or in event of the death of the insured during the continuance in full force of this Policy, the accumulated surplus will be paid in addition to the face amount of this Policy.

Any accumulated surplus to the credit of this Policy may either be drawn in cash, or used in reduction of premium, or applied to increase the paid-up insurance provided for by the terms of this Policy by the amount of similar paid-up life insurance which the accumulated surplus would purchase at the attained age of the insured according to the present established rates of the Company, provided, however, that if such paid-up insurance shall exceed the face amount of this Policy, satisfactory evidence of insurability must first be furnished to the Company.

If no other option is selected, dividends shall be paid in cash.

POST-MORTEM DIVIDEND. Upon the death of the insured during any policy-year, after the first, while this Policy is in force by payment of premiums or by waiver of premiums as provided in Section 4, the Company will pay a post-mortem dividend for the policy-year current at the date of the insured's death.

SECTION 2. POLICY LOANS

Loans will be available during the third policy-year, if three years' premiums have been paid, and at any time

thereafter while this Policy is in force by payment of premiums or by waiver of premiums as provided in Section 4 and may be obtained on proper assignment and delivery of this Policy and on the sole security hereof.

The amount of such loan may be any sum which with interest to the end of the current policy-year will not exceed the cash value at the end of such year less any existing indebtedness on this Policy and any unpaid balance of the current policy-year's premium. The cash value will be the full reserve on this Policy as provided in Section 3 and will be increased by the full reserve on any dividend additions.

The indebtedness or any part thereof may be repaid to the Company at any time.

Interest on loans will be at the rate of 6 per cent. per annum payable at the end of each policy-year. If not paid when due it shall be added to the existing indebtedness provided the total indebtedness on this Policy would not then exceed the cash value plus the full reserve on any dividend additions, and the indebtedness thus created shall bear interest at the same rate.

Failure to repay any such loans or interest thereon shall not void this Policy unless the total indebtedness hereon with interest shall equal or exceed the cash value plus the full reserve on any dividend additions, nor until one month after notice shall have .been mailed to the last-known address of the insured and of the assignee, if any, of record at the Home Office of the Company. All indebtedness on account of this Policy, with accrued interest. shall be deducted from any settlement hereunder. The Company shall have the right to defer the making of a loan hereon (unless for the purpose of paying premiums on policies in this Company) for a period of not exceeding ninety (90) days from the date of the application therefor.

SECTION 3. POLICY VALUES—NON-FORFEITURE IN EVENT OF LAPSE

The full reserve on this Policy will be available upon lapse through non-payment of premiums at the end of the third policy-year or at any time thereafter, and may be used as follows:

(1) To extend automatically the face amount of of this Policy as Term Insurance without participation; or,

(2) To purchase paid-up participating life insurance upon proper written application within one month from the date of lapse; or,

(3) To pay the cash value of this Policy upon proper release and delivery of this Policy within one month from the date of lapse.

The following table states such values for completed policy years. These values will be correspondingly increased for any fractional part of a year's premium which has been paid.

The full reserve on any paid-up insurance or extended insurance, less any indebtedness thereon, will be available as a cash value at any time upon proper release and delivery of this Policy.

The cash value will be increased by the full reserve on any dividend additions and diminished by any existing indebtedness; the amount of paid-up insurance shall be increased or diminished in the same proportion as such cash value is increased or diminished; or the extended insurance shall be for the face amount of this Policy less any indebtedness, and for such a term as such adjusted cash value will provide.

The Company shall have the right to defer the payment of any surrender value of this Policy (unless for the purpose of paying premiums on policies in this Com-

pany) for a period of not exceeding ninety (90) days from the date of the application therefor.

The reserve basis of the following table is the American Experience Table of Mortality with interest at 3 per cent. per annum, according to the net level premium method.

Table of Extended Insurance, Paid-up Insurance, and Loan or Cash Values provided for by this Policy

At End of Year	Term of Automatic Extended Insurance Without Participation				These Values are for $1000 Insurance For this Policy multiply by FIFTEEN Participating Paid-Up Life Insurance On Surrender	Loan or Cash Surrender Values
3d	4	years	72	days	$ 84	$ 35 17
4th	5	"	241	"	111	47 60
5th	7	"	47	"	139	60 39
6th	8	"	208	"	166	73 54
7th	9	"	344	"	193	87 05
8th	11	"	75	"	220	100 94
9th	12	"	121	"	246	115 19
10th	13	"	115	"	272	129 83
11th	14	"	56	"	298	144 86
12th	14	"	313	"	324	160 27
13th	15	"	158	"	349	176 05
14th	15	"	329	"	374	192 20
15th	16	"	96	"	398	208 72
16th	16	"	197	"	422	225 58
17th	16	"	269	"	446	242 77
18th	16	"	316	"	469	260 25
19th	16	"	340	"	491	278 00
20th	16	"	343	"	513	296 00
25th	16	"	136	"	615	388 81
30th	15	"	66	"	701	483 60

Loans are available during the policy-year as provided in Section 2.

SECTION 4. TOTAL AND PERMANENT DISABILITY BENEFITS; WAIVER OF PREMIUM AND MONTHLY INCOME PAYMENT

MONTHLY INCOME PAYMENT. If the insured shall become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the Company will pay to the insured a monthly income equal to one per cent. of the face amount of this Policy (exclusive of any dividend additions). Said income shall start upon the date of receipt by the Company at its Home Office during the insured's lifetime of due proof of total and permanent disability and continue thereafter for the period of the said total disability of the insured prior to the maturity of this Policy. Interest on any indebtedness under this Policy may be deducted from the monthly income payments hereunder.

WAIVER OF PREMIUM. The Company will waive the payment of any premium falling due after receipt of due proof of total and permanent disability and during the continuance of the said total disability of the insured.

NO DEDUCTION FOR BENEFITS GRANTED. In any settlement under this Policy the Company shall not make any deduction on account of monthly income payments made or premiums waived.

PARTICIPATION. This Policy shall continue to participate in surplus during the period of said total and permanent disability.

INCREASING VALUES. Policy values shall increase from year to year in the same manner as though any premiums waived hereunder had been duly paid in cash.

TOTAL AND PERMANENT DISABILITY. Disability shall be total and permanent if the insured is, upon the receipt of due proof, totally and permanently prevented by bodily injury or disease from engaging in any occupation whatever for remuneration or profit and became so disabled while this Policy was in force by payment of premium. Immediately upon receipt of due proof of such total and permanent disability, the benefits shall become effective, subject to the conditions herein provided. If said total disability has been continuous for not less than three consecutive months immediately preceding the receipt of due proof, such disability, if not already approved as permanent, shall nevertheless be deemed to be permanent and upon the receipt of due proof of such disability the benefits shall become effective, subject to the conditions herein provided.

RECOGNIZED DISABILITIES. Without prejudice to any other cause of disability, the Company will recognize the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot, as total and permanent disability.

RECOVERY FROM DISABILITY. The Company, at any time until Disability Benefits have been effective for two full years, and not oftener than once a year thereafter, may require of the insured due proof of the continuance of such total disability. Upon failure to furnish such proof, or if it appear at any time that the insured has engaged or has become able to engage in any occupation whatever for remuneration or profit, all Dis-

ability Benefits under this Policy, except in the case of recognized disabilities hereinbefore mentioned, shall thereupon cease.

TERMINATION. This provision for Total and Permanent Disability Benefits shall automatically terminate:

(1) Upon default in the payment of any premium;

(2) If this Policy be surrendered for its cash value, or if any paid-up insurance or extended insurance provided for in Section 3 of this Policy become effective;

(3) Upon the policy anniversary on which the age of the insured at nearest birthday is sixty years, or if this Policy mature prior to such policy anniversary, then upon such maturity;

(4) If the insured engage in Military or Naval Service in time of war;

(5) If the disability of the insured result from aeronautic or submarine casualty;

(6) If the disability of the insured be voluntarily self-inflicted.

Upon termination under (4), (5), or (6) above, the liability of the Company under this Total and Permanent Disability Benefits provision shall be limited to the amount of the current unearned premium for such benefits, which shall be returned by the Company upon notice.

Upon any termination of this provision for Disability Benefits, or upon receipt by the Company of proper request for discontinuance thereof, accompanied by this Policy for endorsement, any premium thereafter due shall be reduced by the amount payable for the Disability Benefits stated on the first page of this Policy.

Exhibit B

Exhibit B

SECTION 5. DOUBLE INDEMNITY BENEFIT

The Company will pay a Double Indemnity Benefit equal to and in addition to the face amount of this Policy, upon receipt of due proof that the death of the insured resulted solely from bodily injuries effected directly and exclusively by external, violent and accidental means, and that such death occurred within sixty days after sustaining such injuries. This Double Indemnity Benefit shall not be payable if the death of the insured resulted directly or indirectly from illness or disease of any kind or from physical or mental infirmity; from poison administered whether accidentally or intentionally by the insured or by another; from self-destruction at any time whether sane or insane; from any violation of law by the insured; from aeronautic or submarine casualty; or if the injuries were sustained while performing Military or Naval Service in time of war or riot, or while performing police duty as a member of any Military or Naval or Police organization. The Company shall have the right and opportunity to examine the body and to make an autopsy unless prohibited by law.

This provision for Double Indemnity Benefit shall automatically terminate:

(1) Upon default in the payment of any premium;

(2) If this Policy be surrendered for its cash value, or if any paid-up insurance or extended insurance provided for in Section 3 of this Policy become effective;

(3) Upon the policy anniversary on which the age of the insured at nearest birthday is seventy years, or if this Policy mature prior to such policy anniversary, then upon such maturity.

Upon any termination of this provision for Double Indemnity Benefit or upon receipt by the Company of proper request for discontinuance thereof, accompanied by this Policy for endorsement, any premium thereafter due shall be reduced by the amount payable for the Double Indemnity Benefit stated on the first page of this Policy.

SECTION 6. CHANGE OF BENEFICIARY AND ASSIGNMENT

CHANGE OF BENEFICIARY. Whenever the right to change the beneficiary has been reserved in this Policy or in the last Designation of Beneficiary recorded at the Home Office of the Company, the insured or his duly appointed guardian if he be not of legal age (subject to any previous assignment of this Policy duly filed at the Home Office) shall have full power while this Policy is in force to designate a new beneficiary, with or without reserving the right of future designation, by filing written notice thereof at the Home Office and such change shall take place upon such filing and not before.

Furthermore whenever such right to change has been reserved, the insured shall be entitled without the consent of the beneficiary, to any cash dividends declared on this Policy and to the loan or cash value or paid-up insurance herein provided for.

ASSIGNMENT. Any assignment of this Policy shall be furnished to the Company and a duplicate thereof attached hereto. No assignment shall impose any obligation on this Company until the original thereof has been filed at the Home Office of the Company, nor does the Company guarantee the sufficiency or validity of any assignment.

SECTION 7. PAYMENT OF PREMIUMS

PAYMENT OF PREMIUMS. All premiums are due and payable in advance at the Home Office of the Company in the City of Philadelphia, or they may be paid to agents on or before the dates when due in exchange for receipts signed by the President, a Vice-President, Secretary, Treasurer, or Actuary and countersigned by the agent.

The insurance under this Policy is based upon annual premiums payable in advance; but on any anniversary, upon written request, payments may be made semi-annually or quarterly in advance at the premium rates therefor now in use by the Company. Any unpaid portion of the premium for the policy-year during which the death of the insured occurs will be deducted from the sum payable under this Policy.

GRACE IN PAYMENT OF PREMIUMS. A grace of thirty-one days, during which this Policy shall remain in force, will be granted for the payment of premiums or regular instalments thereof, after the first. If the death of the insured occur during the days of grace, the sum necessary to complete payment of premium for the then current policy-year will be deducted from the amount payable hereunder.

REINSTATEMENT. In the event of default in premium payments, unless the cash value has been duly paid, this Policy may be reinstated at any time upon evidence of insurability satisfactory to the Company and the payment of all overdue premiums and the payment or reinstatement of any other indebtedness to the Company upon said Policy, with interest at the rate of 6 per cent. per annum.

SECTION 8. OTHER PROVISIONS

INCONTESTABILITY. This Policy and the application therefor, a copy of which is attached hereto, constitute the entire contract between the parties. This Policy shall be incontestable after it has been in force during the lifetime of the insured for a period of one year from its date of issue except for non-payment of premiums and except as to provisions relating to Disability and Double Indemnity Benefits. All statements made by the insured or on his behalf shall, in the absence of fraud, be deemed representations and not warranties and no such statement shall avoid or be used in defense under this Policy unless it is contained in the written and printed application and a copy of such application is attached to this Policy when issued.

AGE. Any error in stating the age of the insured shall be adjusted by the Company paying under any of the provisions of this Policy such amount as the premium actually paid would have purchased at the correct age.

SUICIDE. If the insured, whether sane or insane, shall commit suicide within one year from the date of issue of this Policy, the liability of the Company shall be limited to the amount of the premium paid hereon.

ALTERATIONS. No alteration of this Policy, or waiver of any of its conditions shall be valid unless endorsed hereon and signed by an Officer of the Company. No agent is authorized to modify, alter or enlarge this contract or to bind the Company by any promise or undertaking as to distribution of surplus or any future award of interest.

SECTION 9. OPTIONS FOR PAYMENT OF THIS POLICY AS AN INCOME

The insured, subject to any designation of beneficiary or assignment of this Policy filed with the Company, as provided in Section 6, may elect in writing that the net proceeds of this Policy at maturity, or any part thereof, or the cash value before maturity, not less than $1,000, shall be payable according to any of the following options. In such written election no beneficiary entitled to the proceeds of this Policy or any part thereof or any instalment of interest or principal to become due thereon shall have the right to commute, withdraw, surrender, encumber, alienate or assign the same upon any terms whatsoever unless by the written permission of the insured.

The beneficiary entitled to receive the net proceeds when payable, may elect in writing to have the net proceeds payable according to any of the following options, in event of the failure of the insured to do so.

The tables under Options A, B and C are based upon a policy the net proceeds of which are $1,000, and apply pro rata to this Policy, and provide for annual or monthly instalments, first instalment to be paid at maturity or upon proper surrender for cash value. The income may be made payable in equivalent equal semi-annual or quarterly instalments upon proper request; to find the semi-annual instalment, multiply the annual instalment by .5037 and to find the quarterly instalment multiply by .2528.

OPTION A. INCOME FOR ONE TO THIRTY YEARS CERTAIN in annual or monthly instalments as may be elected according to the following table.

Number of Years	1	2	3	4	5	6	7	8
Annual	1000.00	507.39	343.23	261.19	211.99	179.22	155.83	138.31
Monthly	84.50	42.87	29.00	22.07	17.91	15.14	13.17	11.69

Number of Years	9	10	11	12	13	14	15	16
Annual	124.69	113.82	104.93	97.54	91.29	85.95	81.33	77.29
Monthly	10.54	9.62	8.87	8.24	7.71	7.26	6.87	6.53

Number of Years	17	18	19	20	21	22	23	24
Annual	73.74	70.59	67.78	65.26	62.98	60.92	59.04	57.33
Monthly	6.23	5.96	5.73	5.51	5.32	5.15	4.99	4.84

Number of Years	25	26	27	28	29	30
Annual	55.76	54.31	52.97	51.74	50.60	49.53
Monthly	4.71	4.59	4.48	4.37	4.28	4.19

OPTION B. INCOME FOR TWENTY YEARS CERTAIN AND AS LONG THEREAFTER AS THE BENEFICIARY MAY LIVE, in annual or monthly instalments, as may be elected according to the following table.

Age of Beneficiary	10 and under	11	12	13	14	15	16	17
Annual	39.52	39.70	39.89	40.08	40.28	40.49	40.71	40.94
Monthly	3.34	3.35	3.37	3.39	3.40	3.42	3.44	3.46

Age of Beneficiary	18	19	20	21	22	23	24	25
Annual	41.18	41.43	41.69	41.96	42.24	42.53	42.84	43.16
Monthly	3.48	3.50	3.52	3.55	3.57	3.59	3.62	3.65

Age of Beneficiary	26	27	28	29	30	31	32	33
Annual	43.49	43.84	44.21	44.59	44.98	45.39	45.82	46.27
Monthly	3.67	3.70	3.74	3.77	3.80	3.84	3.87	3.91

Age of Beneficiary	34	35	36	37	38	39	40
Annual	46.74	47.23	47.73	48.26	48.80	49.36	49.95
Monthly	3.95	3.99	4.03	4.08	4.12	4.17	4.22

Age of Beneficiary	41	42	43	44	45	46	47	48
Annual	50.55	51.17	51.81	52.46	53.12	53.80	54.50	55.19
Monthly	4.27	4.32	4.38	4.43	4.49	4.55	4.61	4.66

Age of Beneficiary	49	50	51	52	53	54	55	56
Annual	55.89	56.59	57.29	57.98	58.66	59.33	59.97	60.58
Monthly	4.72	4.78	4.84	4.90	4.96	5.01	5.07	5.12

Age of Beneficiary	57	58	59	60	61	62	63	64
Annual	61.17	61.72	62.24	62.71	63.15	63.54	63.89	64.19
Monthly	5.17	5,22	5.26	5.30	5.34	5.37	5.40	5.42

Age of Beneficiary	65	66	67	68	69	70 and over
Annual	64.45	64.67	64.85	64.99	65.09	65.16
Monthly	5.45	5.46	5.48	5.49	5.50	5.51

OPTION C. INCOME FOR TEN YEARS CERTAIN AND AS LONG THEREAFTER AS THE BENEFICIARY MAY LIVE, in annual or monthly instalments, as may be elected according to the following table.

Age of Beneficiary	10 and under	11	12	13	14	15	16	17
Annual	40.62	40.81	41.01	41.23	41.45	41.68	41.92	42.17
Monthly	3.43	3.45	3.47	3.48	3.50	3.52	3.54	3.56
Age of Beneficiary	18	19	20	21	22	23	24	25
Annual	42.43	42.70	42.99	43.29	43.60	43.93	44.27	44.63
Monthly	3.59	3.61	3.63	3.66	3.68	3.71	3.74	3.77
Age of Beneficiary	26	27	28	29	30	31	32	33
Annual	45.01	45.40	45.81	46.25	46.70	47.19	47.69	48.22
Monthly	3.80	3.84	3.87	3.91	3.95	3.99	4.03	4.07
Age of Beneficiary	34	35	36	37	38	39	40	41
Annual	48.77	49.36	49.98	50.63	51.31	52.01	52.74	53.51
Monthly	4.12	4.17	4.22	4.28	4.34	4.39	4.46	4.52
Age of Beneficiary	42	43	44	45	46	47	48	49
Annual	54.27	55.06	55.90	56.78	57.71	58.69	59.72	60.79
Monthly	4.59	4.65	4.72	4.80	4.88	4.96	5.05	5.14
Age of Beneficiary	50	51	52	53	54	55	56	57
Annual	61.92	63.09	64.32	65.60	66.93	68.31	69.73	71.20
Monthly	5.23	5.33	5.44	5.54	5.66	5.77	5.89	6.02
Age of Beneficiary	58	59	60	61	62	63	64	65
Annual	72.72	74.27	75.85	77.45	79.07	80.70	82.32	83.93
Monthly	6.14	6.28	6.41	6.54	6.68	6.82	6.96	7.09
Age of Beneficiary	66	67	68	69	70	71	72	73
Annual	85.52	87.07	88.57	90.02	91.40	92.70	93.91	95.02
Monthly	7.23	7.36	7.48	7.61	7.72	7.83	7.94	8.03
Age of Beneficiary	74	75	76	77	78	79	80 and over	
Annual	96.02	96.90	97.76	98.59	99.38	100.02	100.52	
Monthly	8.11	8.19	8.26	8.33	8.40	8.45	8.49	

The income under Option A or the income during the instalments-certain period under Option B or C, after the first year, will be increased annually by such surplus as may be awarded by the Board of Trustees. Upon the death of any beneficiary, any unpaid instalments under Option A or unpaid instalments-certain under Option B or C, or the commuted value thereof, calculated upon the basis of 3 per cent. per annum compound interest, will be paid as agreed upon in the election of the option.

Options B and C are based on the age of the beneficiary at last birthday and are not available when an association, firm or corporation is beneficiary or assignee.

OPTION D. INTEREST INCOME ON THE NET PROCEEDS payable for such a period as may be agreed upon in the election of this option.

OPTION E. INCOME OF A FIXED AMOUNT PAYABLE UNTIL THE NET PROCEEDS AND INTEREST PAYMENTS TO BE ADDED THERETO ARE EXHAUSTED, the final payment to be the balance then remaining with the Company.

Under Options D and E, the net proceeds are left with the Company at interest at the rate of 3 per cent. per annum, increased annually by such additions as may be awarded by the Board of Trustees, and the income may be made payable annually or in equivalent equal semi-annual, quarterly or monthly payments commencing at the end of the first interest period, with a further payment for the period elapsing between the last regular payment and the date of death of the beneficiary. Payments of principal and interest shall be subject to such provisions as may be agreed upon in the election of either of these options.

Exhibit B

No. 6M-12

[Stamped on face]: Disability Claim Examined.

1191014
No.Ed. 3-24

APPLICATION FOR INSURANCE IN
THE PENN MUTUAL LIFE INSURANCE COMPANY
OF PHILADELPHIA, PA.

1 A. Name in Full (please print)
James McCulloch Jr.

B. Residence Address

No. Street	City	County	State
4275 Ingleside Ave,	San Diego,		Calif.

C. If in County
....Miles.... Direction
R.F.D. From Above City.

How Long Have You Resided at Present Address?
9 Years

D. Business Address

No. Street	City	County	State
914 Beech	San Diego,		Calif

E. Send Premium Notices to
914 Beech St. San Diego, Calif.

4 A. When and Where Were you Born?

Place	County	State
Baltimore		Md.

B.

Day	Month	Year	Age Nearest Birthday
6	Dec.	1893	32

5. Are You (Indicate by X)
Married X Single.... Widower....
Widow....

6 A. What Other Insurance Have You on Your Life?

Company		Amount
Metropolitan	20 Pay Life	16,000.00
Acasia	" " "	5,000.00

F. If Married Woman, Give
Maiden Name Husband's Name

G. Places of Residence Last Five Years
San Diego, Calif.

H. Do You Intend to Change Residence or Travel Outside the U. S.? (Give Details)
No.

I. Are You Engaged in Military or Naval Service? No
Do You Intend so to Engage? No

J. Are You Engaged in Aeronautics or Submarine Service? No
Do You Intend so to Engage? No

2 A. Occupation (State Kind of Business)
Proprietor and Superintendent McCulloch Hospital

B. Occupation During the Last Five Years
As Above

C. Any Change of Occupation Contemplated, Either Temporary or Permanent? (Give Details) No

B. Have You Ever Applied to Any Company or Agent Without Receiving a Policy of the Exact Kind and Amount Applied for? No

C. Are Any Applications Now Pending (Give Details) No

7 A. Sum to Be Insured $10,000.00
B. Plan OLRE

C. Premiums Payable
√Annually
Semi-Annually
Quarterly

D. If Disability Benefits Desired, Indicate by X
Disability Waiver of Premium ....
Disability Waiver of Premium and Annuity X
Double Indemnity X

8. How is Surplus to Be Used?
(Rule out Those Not Desired)
To Reduce Premiums
To Increase Amount Insured

3 A. To Whom Shall Policy Be Made Payable? Anna R. McCulloch
If Said Beneficiary Outlives me, Otherwise to My Estate

B. Address San Diego, Cal. 4275 Ingleside Ave.

C. Relationship Wife

D. Beneficiary's Date of Birth June 1st, 1893

E. Do you Reserve the Right to Change Beneficiary? Yes

F. If Beneficiary Is Married Woman, State Maiden Name Husband's Name Rogan

To Accumulate at 3% Interest
√To Accelerate Maturity

9. What Settlement, If Any, Was Effected for Premium on Policy Hereby Applied For? Note

Remarks (Use This Space for Beneficiary Provisions, Preliminary Term Premiums, Etc.)

....

....

For Home Office Endorsements Only

....

[On Margin]: NOTICE—THE FULL NAMES of all persons must be written and signed plainly and distinctly. Names must not be abbreviated. Every question must be fully answered. When a Creditor insures the life of a Debtor, both must sign.

My statements and answers to the questions printed above, and my statements and answers made and given to the Company's Medical Examiner, are full, complete and true. Upon them I base my application for insurance, and agree that they shall be regarded as a part of

the contract if and when issued. If the premium on the insurance herein applied for is not paid at the time of making this application, the contract of insurance shall not be in force unless or until a policy shall be issued and delivered to me and the first premium thereon actually paid during my lifetime and good health. If settlement is effected in accordance with the attached receipt at the time of making this application, the policy shall be in force as of the date of such settlement, provided the application is approved by the Company at the Home Office. The policy if and when issued and delivered to me, shall be in the form now in use by the Company. I understand that neither agents nor examiners have any authority to modify, alter or enlarge contracts. The foregoing agreements and declarations are made on behalf of myself and of any beneficiary under any policy on my life issued by the Company upon this application. 130473 to 130475

My acceptance of any policy issued on this application will constitute a ratification by me of any correction in or addition to this application made by the Company and noted in the space provided for "Home Office Endorsements Only."

In Witness Whereof, the applicant has hereunto subscribed his name. Dated at San Diego the 29 day of September 1925

Witness Present:

Don C. Carrell .... Signature of the person proposed for insurance. James McCulloch, Jr. .... Sign the Names in full.

No. 434230

QUESTIONS TO BE ANSWERED BY THE PERSON TO BE INSURED

Name of Applicant James McCulloch Jr. Examined 11 A. M. This 30th Day of Sept. 1925.
(Write name in printed letters)

At San Diego, County of San Diego State of Calif. Residence 4275 Ingleside

Do you Contemplate Any Change of Residence or Occupation? No Date of Birth? Dec. 6, 1893 Name of Agent? D. C. Carrell Henking & Randolph

10. A.		Age if Living	State of Health	Age at Death	Cause of Death	Duration of Fatal Illness
Father		89	Good			
Mother				57	(Gall Bladder√	
Full Brothers { How Many Living	2	17-29	Both		(Acidosis from	
" " Dead?	0		Good		(Operation	3 days√
Full Sisters { How Many Living	1	27	Good			
" " Dead	0					

Wife or Husband's Age If Living	State of Health	Age at Death	Cause of Death
31	Good	—	—

Ages Attained:	Father's Father	Father's Mother	Mother's Father	Mother's Mother
	D.K.	D.K.	D.K.	D.K.

(B) Has any near relative, uncles, aunts and grandparents included, had tuberculosis (consumption), cancer, apoplexy or Bright's disease. Explain fully. No.
If the family history shows a lack of longevity, give number and ages of uncles and aunts. See Note 6.

Question	Answer
11 A. Are you now in good health? B. When were you last attended by a physician or consulted one? C. For what disease?	A. Yes. B. 1920. C. Crushed lt. middle finger
D. Give details in full.	D. Caught finger in bearing of auto.
E. Give name and residence of the physician who attended you.	E. Dr. Mott Arnold. Front & Spruce Sts., City
F. Give name and residence of your medical adviser, or family physician, to whom you now refer for a certificate, if deemed necessary.	F. None
G. Has any physician ever given an unfavorable opinion of your insurability after either a formal or an informal examination?	G. No
H. Has any physician ever advised you to try a change of climate?	H. No
12. A. Have you ever been ruptured? B. Have you a hernia now? C. If so, do you now wear a suitable truss? D. Do you agree to wear one while insured in this company? Note 7.	A. No B. No C. — D. Yes—if necessary

Question	Answer	
13. A. Do you now use intoxicating liquors? B. To what extent?	A. No	B. None
C. Have you ever used intoxicating liquors to excess? If so, explain the duration and extent of excess, and when last.	C. No	
D. Have you ever taken a cure for inebriety? Note 6.	D. No	
14. Have you ever used opium, morphia, chloral or any narcotic, unless regularly prescribed by a physician? If so, explain fully.	No	
15. A. Have you had insanity, apoplexy, palsy, vertigo, convulsions, sunstroke, congestion, inflammation, or any other disorder of the brain or nervous system?	A. No	
B. Have you had asthma, consumption, spitting of blood, habitual cough and expectoration, palpitation, or any disease of the throat, heart or lungs?	B. No	
C. Have you had appendicitis, indigestion, biliousness, cancer, or any tumor, pellagra, chronic diarrhoea, ear discharge, dropsy, fistula, gall-stones or gravel,	C. No	

Question	Answer
renal or hepatic colic, open sores, inflammatory rheumatism, gout, syphilis or stricture, or any disease of the liver, kidneys, or bladder? Notes 8 and 9.	
D. Have you any defect in hearing, in vision of either eye, any malformation or varicose veins?	D. No
E. Are you now, or have you recently been associated with a person who has or has had consumption?	E. No
16. Have you ever had illness, disease, injury or operation other than as stated by you above? If so, give full particulars, date, duration, severity, etc., of each. Use reverse side if necessary.	Yes, fract. rt. forearm—both bones above wrist—complete recovery.

I Hereby Agree, That all the foregoing statements and answers, made to the Company's Medical Examiner, are a part of my application for insurance, are declared to be full, complete and true, and are offered to the Company as a consideration for the Contract.

Witnessed by the Examiner	H. S. Anderton, M. D.	Signature of the person proposed for insurance	James McCulloch, Jr.

[On Cover]: COPY

No..................

THE
PENN MUTUAL LIFE
INSURANCE COMPANY
PHILADELPHIA

NAME OF INSURED

JAMES MC CULLOCH, JR.

ORDINARY LIFE RATE
ENDOWMENT POLICY

ANNUAL DIVIDENDS

DOUBLE INDEMNITY BENEFIT

TOTAL AND PERMANENT
DISABILITY BENEFITS

PROVIDING FOR
WAIVER OF PREMIUM AND
MONTHLY INCOME PAYMENT

Amount, $15,000.00

Date of Policy, November 27th, 1925

Yearly Payment, $413.40
During the Continuance of this Policy
Payable..Annually
Due the 27th day of November

EXHIBIT C

Copy

THE PENN MUTUAL

NUMBER	(Emblem)	AMOUNT
....		5,000.00

"We are met on the broad pathway of good faith and good will."

LIFE INSURANCE COMPANY
OF PHILADELPHIA

Hereby insures the life of

JAMES MCCULLOCH JR.
THE INSURED

and agrees to pay
FIVE THOUSAND Dollars,

whenever the reserve on this Policy (according to the Ordinary Life Plan and the American Experience Table of Mortality with interest at 3 per cent.), together with the accumulated surplus then to the credit of this Policy, shall equal the face amount, to James McCulloch, Jr., the insured, which payment shall be in full settlement of all demands against the said Company under this Policy; or if the said insured should die before this Policy matures as above provided, then to pay the said face amount, together with the accumulated surplus to Anna R. McCulloch, his wife, if she survive him, otherwise to his executors, administrators or assigns,

THE BENEFICIARY

upon receipt of due proof of the death of the insured and delivery of this Policy.

The right to change the beneficiary is reserved by the insured.

DISABILITY BENEFITS

The Company agrees to waive payment of subsequent premiums upon receipt of due proof that the insured has become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years as provided in section four.

DIVIDENDS

Dividends of Surplus under this Policy shall be awarded and may be used as provided in section one.

FULL PAID OPTION

When at the expiration of any policy-year, the accumulated surplus to the credit of this Policy, together with its guaranteed cash surrender value as specified on the second page hereof, shall equal or exceed the net single premium required at the attained age of the insured to make this Policy full-paid, such net single premium to be calculated on the same bases as the net yearly premium on this Policy, then upon proper written application it will be declared a full-paid policy and will participate annually thereafter as such and any excess of these dividends over the amount required for the purpose above described shall then be paid in cash.

PREMIUMS

This contract is made in consideration of the payment in advance to the Company at its Home Office of the sum of One Hundred Twenty-two & 50/100 Dollars, at the date hereof, and upon condition that the annual premium of One Hundred Twenty-two & 50/100 Dollars is paid on or before the Twenty-seventh day of November in every year until the maturity of this Policy, subject to waiver of payment of premiums in event of total and permanent disability.

The annual premium stated above includes One & 80/100 Dollars for the Total and Permanent Disability Benefits and shall be correspondingly reduced upon any termination of such Benefits as provided in section four.

Premium payments may be made annually, or in semi-annual or quarterly instalments at the rates shown on the margin hereof and as provided in section six.

All the benefits, privileges and provisions stated on the second and third pages hereof form a part of this Policy as fully as though recited at length over the signatures hereto affixed.

IN WITNESS WHEREOF, THE PENN MUTUAL LIFE INSURANCE COMPANY of Philadelphia has caused this Policy to be signed by its President, Secretary and Actuary, attested by its Registrar, at its Home Office in Philadelphia, Pennsylvania, on the date of issue, the Twenty-seventh day of November 1925.

Sydney A Smith Secretary. Wm A Law President.

Attest:

..................................Registrar. J. Burnett Gibb Actuary.

ORDINARY LIFE RATE ENDOWMENT POLICY—ANNUAL DIVIDENDS—TOTAL AND PERMANENT DISABILITY BENEFITS PROVIDING FOR WAIVER OF PREMIUM.

AGE 32
ANNUAL PREMIUM $122.50
SEMI-ANNUAL PREMIUM $62.50
QUARTERLY PREMIUM $31.85
Examined by M. C. F.

made from Home Office records
I hereby certify that this is a ~~true~~ copy ^ of Policy No. 1196773 issued by The Penn Mutual Life Ins. Co. on the Life of "James McCulloch, Jr."

....
Asst Supervisor of Applications
and Death Claims

Policy Form No. 6M-01 O. L. R. E. W. P. Ed. 6, 1924.

Exhibit C

FROM THE DATE OF ISSUE THIS POLICY SHALL BE WITHOUT ANY RESTRICTIONS AS TO TRAVEL OR RESIDENCE

SECTION 1. PARTICIPATION—DIVIDENDS OF SURPLUS

ANNUAL DIVIDENDS. This Policy will participate in surplus while in force by payment of premiums or by waiver of premiums as provided in Section 4. Dividends will be determined and accounted for by the Company and will be available upon payment of the

second year's premium, and at the end of the second and of each subsequent policy-year.

All distributions of surplus awarded to this Policy and remaining in the hands of the Company shall be accumulated at four per cent. per annum, compound interest, or the average net rate realized by the Company upon its assets if it be less; this surplus and interest, increased annually by such addition as may be awarded by the Board of Trustees, will be used to mature this Policy as an Endowment, as provided on the first page hereof, or in event of the death of the insured during the continuance in full force of this Policy, the accumulated surplus will be paid in addition to the face amount of this Policy.

Any accumulated surplus to the credit of this Policy may either be drawn in cash, or used in reduction of premium, or applied to increase the paid-up insurance provided for by the terms of this Policy by the amount of similar paid-up life insurance which the accumulated surplus would purchase at the attained age of the insured according to the present established rates of the Company, provided, however, that if such paid-up insurance shall exceed the face amount of this Policy, satisfactory evidence of insurability must first be furnished to the Company.

If no other option is selected, dividends shall be paid in cash.

POST-MORTEM DIVIDEND. Upon the death of the insured during any policy-year, after the first, while this Policy is in force by payment of premiums or by waiver of premiums as provided in Section 4, the Company will pay a post-mortem dividend for the policy-year current at the date of the insured's death.

SECTION 2. POLICY LOANS

Loans will be available during the third policy-year, if three years' premiums have been paid, and at any time

thereafter while this Policy is in force by payment of premiums or by waiver of premiums as provided in Section 4 and may be obtained on proper assignment and delivery of this Policy and on the sole security hereof.

The amount of such loan may be any sum which with interest to the end of the current policy-year will not exceed the cash value at the end of such year less any existing indebtedness on this Policy and any unpaid balance of the current policy-year's premium. The cash value will be the full reserve on this Policy as provided in Section 3 and will be increased by the full reserve on any dividend additions.

The indebtedness or any part thereof may be repaid to the Company at any time.

Interest on loans will be at the rate of 6 per cent. per annum payable at the end of each policy-year. If not paid when due it shall be added to the existing indebtedness provided the total indebtedness on this Policy would not then exceed the cash value plus the full reserve on any dividend additions, and the indebtedness thus created shall bear interest at the same rate.

Failure to repay any such loans or interest thereon shall not void this Policy unless the total indebtedness hereon with interest shall equal or exceed the cash value plus the full reserve on any dividend additions, nor until one month after notice shall have been mailed to the last-known address of the insured and of the assignee, if any, of record at the Home Office of the Company. All indebtedness on account of this Policy, with accrued interest. shall be deducted from any settlement hereunder. The Company shall have the right to defer the making of a loan hereon (unless for the purpose of paying premiums on policies in this Company) for a period of not exceeding ninety (90) days from the date of the application therefor.

SECTION 3. POLICY VALUES— NON-FORFEITURE IN EVENT OF LAPSE

The full reserve on this Policy will be available upon lapse through non-payment of premiums at the end of the third policy-year or at any time thereafter, and may be used as follows:

(1) To extend automatically the face amount of of this Policy as Term Insurance without participation; or,

(2) To purchase paid-up participating life insurance upon proper written application within one month from the date of lapse; or,

(3) To pay the cash value of this Policy upon proper release and delivery of this Policy within one month from the date of lapse.

The following table states such values for completed policy years. These values will be correspondingly increased for any fractional part of a year's premium which has been paid.

The full reserve on any paid-up insurance or extended insurance, less any indebtedness thereon, will be available as a cash value at any time upon proper release and delivery of this Policy.

The cash value will be increased by the full reserve on any dividend additions and diminished by any existing indebtedness; the amount of paid-up insurance shall be increased or diminished in the same proportion as such cash value is increased or diminished; or the extended insurance shall be for the face amount of this Policy less any indebtedness, and for such a term as such adjusted cash value will provide.

The Company shall have the right to defer the payment of any surrender value of this Policy (unless for the purpose of paying premiums on policies in this Com-

pany) for a period of not exceeding ninety (90) days from the date of the application therefor.

The reserve basis of the following table is the American Experience Table of Mortality with interest at 3 per cent. per annum, according to the net level premium method.

Table of Extended Insurance, Paid-up Insurance, and Loan or Cash Values provided for by this Policy

These Values are for $1000 Insurance
For this Policy multiply by FIVE

At End of Year	Term of Automatic Extended Insurance Without Participation				Participating Paid-Up Life Insurance On Surrender	Loan or Cash Surrender Values
3d	4	years	72	days	$ 84	$ 35 17
4th	5	"	241	"	111	47 60
5th	7	"	47	"	139	60 39
6th	8	"	208	"	166	73 54
7th	9	"	344	"	193	87 05
8th	11	"	75	"	220	100 94
9th	12	"	121	"	246	115 19
10th	13	"	115	"	272	129 83
11th	14	"	56	"	298	144 86
12th	14	"	313	"	324	160 27
13th	15	"	158	"	349	176 05
14th	15	"	329	"	374	192 20
15th	16	"	96	"	398	208 72
16th	16	"	197	"	422	225 58
17th	16	"	269	"	446	242 77
18th	16	"	316	"	469	260 25
19th	16	"	340	"	491	278 00
20th	16	"	343	"	513	296 00
25th	16	"	136	"	615	388 81
30th	15	"	66	"	701	483 60

Loans are available during the policy-year as provided in Section 2.

SECTION 4. TOTAL AND PERMANENT DISABILITY BENEFITS; WAIVER OF PREMIUM

WAIVER OF PREMIUM. If the insured shall become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the Company will waive the payment of any premium falling due after receipt by the Company at its Home Office during the insured's lifetime of due proof of total and permanent disability and will continue to waive payment of premiums for the period of the said total disability of the insured prior to the maturity of this policy.

NO DEDUCTION FOR BENEFITS GRANTED. In any settlement under this Policy the Company shall not make any deduction on account of premiums waived.

PARTICIPATION. This Policy shall continue to participate in surplus during the period of said total and permanent disability.

INCREASING VALUES. Policy values shall increase from year to year in the same manner as though any premiums waived hereunder had been duly paid in cash.

TOTAL AND PERMANENT DISABILITY. Disability shall be total and permanent if the insured is, upon the receipt of due proof, totally and permanently prevented by bodily injury or disease from engaging in any occupation whatever for remuneration or profit and became so disabled while this Policy was in force by pay-

ment of premium. Immediately upon receipt of due proof of such total and permanent disability, the benefits shall become effective, subject to the conditions herein provided. If said total disability has been continuous for not less than three consecutive months immediately preceding the receipt of due proof, such disability, if not already approved as permanent, shall nevertheless be deemed to be permanent and upon the receipt of due proof of such disability the benefits shall become effective, subject to the conditions herein provided.

RECOGNIZED DISABILITIES. Without prejudice to any other cause of disability, the Company will recognize the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot, as total and permanent disability.

RECOVERY FROM DISABILITY. The Company, at any time until Disability Benefits have been effective for two full years, and not oftener than once a year thereafter, may require of the insured due proof of the continuance of such total disability. Upon failure to furnish such proof, or if it appear at any time that the insured has engaged or has become able to engage in any occupation whatever for remuneration or profit, all Disability Benefits under this Policy, except in the case of recognized disabilities hereinbefore mentioned, shall thereupon cease.

TERMINATION. This provision for Total and Permanent Disability Benefits shall automatically terminate:

(1) Upon default in the payment of any premium;

(2) If this Policy be surrendered for its cash value, or if any paid-up insurance or extended insurance provided for in Section 3 of this Policy become effective;

(3) Upon the policy anniversary on which the age of the insured at nearest birthday is sixty years, or if this Policy mature prior to such policy anniversary, then upon such maturity;

(4) If the insured engage in Military or Naval Service in time of war;

(5) If the disability of the insured result from aeronautic or submarine casualty;

(6) If the disability of the insured be voluntarily self-inflicted.

Upon termination under (4), (5), or (6) above, the liability of the Company under this Total and Permanent Disability Benefits provision shall be limited to the amount of the current unearned premium for such benefits, which shall be returned by the Company upon notice.

Upon any termination of this provision for Disability Benefits, or upon receipt by the Company of proper request for discontinuance thereof, accompanied by this Policy for endorsement, any premium thereafter due shall be reduced by the amount payable for the Disability Benefits stated on the first page of this Policy.

Exhibit C

Exhibit C

SECTION 5. CHANGE OF BENEFICIARY AND ASSIGNMENT

CHANGE OF BENEFICIARY. Whenever the right to change the beneficiary has been reserved in this Policy or in the last Designation of Beneficiary recorded at the Home Office of the Company, the insured or his duly appointed guardian if he be not of legal age (subject to any previous assignment of this Policy duly filed at the Home Office) shall have full power while this Policy is in force to designate a new beneficiary, with or without reserving the right of future designation, by filing written notice thereof at the Home Office and such change shall take place upon such filing and not before.

Furthermore whenever such right to change has been reserved, the insured shall be entitled without the consent of the beneficiary, to any cash dividends declared on this Policy and to the loan or cash value or paid-up insurance herein provided for.

ASSIGNMENT. Any assignment of this Policy shall be furnished to the Company and a duplicate thereof attached hereto. No assignment shall impose any obligation on this Company until the original thereof has been filed at the Home Office of the Company, nor does the Company guarantee the sufficiency or validity of any assignment.

SECTION 6. PAYMENT OF PREMIUMS

PAYMENT OF PREMIUMS. All premiums are due and payable in advance at the Home Office of the Company in the City of Philadelphia, or they may be paid to agents on or before the dates when due in exchange for receipts signed by the President, a Vice-President, Secretary, Treasurer, or Actuary and countersigned by the agent.

The insurance under this Policy is based upon annual premiums payable in advance; but on any anniversary, upon written request, payments may be made semi-annually or quarterly in advance at the premium rates therefor now in use by the Company. Any unpaid portion of the premium for the policy-year during which the death of the insured occurs will be deducted from the sum payable under this Policy.

GRACE IN PAYMENT OF PREMIUMS. A grace of thirty-one days, during which this Policy shall remain in force, will be granted for the payment of premiums or regular instalments thereof, after the first. If the death of the insured occur during the days of grace, the sum necessary to complete payment of premium for the then current policy-year will be deducted from the amount payable hereunder.

REINSTATEMENT. In the event of default in premium payments, unless the cash value has been duly paid, this Policy may be reinstated at any time upon evidence of insurability satisfactory to the Company and the payment of all overdue premiums and the payment or reinstatement of any other indebtedness to the Company upon said Policy, with interest at the rate of 6 per cent. per annum.

SECTION 7. OTHER PROVISIONS

INCONTESTABILITY. This Policy and the application therefor, a copy of which is attached hereto, constitute the entire contract between the parties. This Policy shall be incontestable after it has been in force during the lifetime of the insured for a period of one year from its date of issue except for non-payment of premiums and except as to provisions relating to Disability and Double Indemnity Benefits. All statements made by the insured or on his behalf shall, in the absence of fraud, be deemed representations and not warranties and no such statement shall avoid or be used in defense under this Policy unless it is contained in the written and printed application and a copy of such application is attached to this Policy when issued.

AGE. Any error in stating the age of the insured shall be adjusted by the Company paying under any of the provisions of this Policy such amount as the premium actually paid would have purchased at the correct age.

SUICIDE. If the insured, whether sane or insane, shall commit suicide within one year from the date of issue of this Policy, the liability of the Company shall be limited to the amount of the premium paid hereon.

ALTERATIONS. No alteration of this Policy, or waiver of any of its conditions shall be valid unless endorsed hereon and signed by an Officer of the Company. No agent is authorized to modify, alter or enlarge this contract or to bind the Company by any promise or undertaking as to distribution of surplus or any future award of interest.

SECTION 8. OPTIONS FOR PAYMENT OF THIS POLICY AS AN INCOME

The insured, subject to any designation of beneficiary or assignment of this Policy filed with the Company, as provided in Section 6, may elect in writing that the net proceeds of this Policy at maturity, or any part thereof, or the cash value before maturity, not less than $1,000, shall be payable according to any of the following options. In such written election no beneficiary entitled to the proceeds of this Policy or any part thereof or any instalment of interest or principal to become due thereon shall have the right to commute, withdraw, surrender, encumber, alienate or assign the same upon any terms whatsoever unless by the written permission of the insured.

The beneficiary entitled to receive the net proceeds when payable, may elect in writing to have the net proceeds payable according to any of the following options, in event of the failure of the insured to do so.

The tables under Options A, B and C are based upon a policy the net proceeds of which are $1,000, and apply pro rata to this Policy, and provide for annual or monthly instalments, first instalment to be paid at maturity or upon proper surrender for cash value. The income may be made payable in equivalent equal semi-annual or quarterly instalments upon proper request; to find the semi-annual instalment, multiply the annual instalment by .5037 and to find the quarterly instalment multiply by .2528.

OPTION A. INCOME FOR ONE TO THIRTY YEARS CERTAIN in annual or monthly instalments as may be elected according to the following table.

Number of Years	1	2	3	4	5	6	7	8
Annual	1000.00	507.39	343.23	261.19	211.99	179.22	155.83	138.31
Monthly	84.50	42.87	29.00	22.07	17.91	15.14	13.17	11.69

Number of Years	9	10	11	12	13	14	15	16
Annual	124.69	113.82	104.93	97.54	91.29	85.95	81.33	77.29
Monthly	10.54	9.62	8.87	8.24	7.71	7.26	6.87	6.53

Number of Years	17	18	19	20	21	22	23	24
Annual	73.74	70.59	67.78	65.26	62.98	60.92	59.04	57.33
Monthly	6.23	5.96	5.73	5.51	5.32	5.15	4.99	4.84

Number of Years	25	26	27	28	29	30
Annual	55.76	54.31	52.97	51.74	50.60	49.53
Monthly	4.71	4.59	4.48	4.37	4.28	4.19

OPTION B. INCOME FOR TWENTY YEARS CERTAIN AND AS LONG THEREAFTER AS THE BENEFICIARY MAY LIVE, in annual or monthly instalments, as may be elected according to the following table.

Age of Beneficiary	10 and under	11	12	13	14	15	16	17
Annual	39.52	39.70	39.89	40.08	40.28	40.49	40.71	40.94
Monthly	3.34	3.35	3.37	3.39	3.40	3.42	3.44	3.46

Age of Beneficiary	18	19	20	21	22	23	24	25
Annual	41.18	41.43	41.69	41.96	42.24	42.53	42.84	43.16
Monthly	3.48	3.50	3.52	3.55	3.57	3.59	3.62	3.65

Age of Beneficiary	26	27	28	29	30	31	32	33
Annual	43.49	43.84	44.21	44.59	44.98	45.39	45.82	46.27
Monthly	3.67	3.70	3.74	3.77	3.80	3.84	3.87	3.91

Age of Beneficiary	34	35	36	37	38	39	40
Annual	46.74	47.23	47.73	48.26	48.80	49.36	49.95
Monthly	3.95	3.99	4.03	4.08	4.12	4.17	4.22

Age of Beneficiary	41	42	43	44	45	46	47	48
Annual	50.55	51.17	51.81	52.46	53.12	53.80	54.50	55.19
Monthly	4.27	4.32	4.38	4.43	4.49	4.55	4.61	4.66

Age of Beneficiary	49	50	51	52	53	54	55	56
Annual	55.89	56.59	57.29	57.98	58.66	59.33	59.97	60.58
Monthly	4.72	4.78	4.84	4.90	4.96	5.01	5.07	5.12

Age of Beneficiary	57	58	59	60	61	62	63	64
Annual	61.17	61.72	62.24	62.71	63.15	63.54	63.89	64.19
Monthly	5.17	5.22	5.26	5.30	5.34	5.37	5.40	5.42

Age of Beneficiary	65	66	67	68	69	70 and over
Annual	64.45	64.67	64.85	64.99	65.09	65.16
Monthly	5.45	5.46	5.48	5.49	5.50	5.51

OPTION C. INCOME FOR TEN YEARS CERTAIN AND AS LONG THEREAFTER AS THE BENEFICIARY MAY LIVE, in annual or monthly instalments, as may be elected according to the following table.

Age of Beneficiary	10 and under	11	12	13	14	15	16	17
Annual	40.62	40.81	41.01	41.23	41.45	41.68	41.92	42.17
Monthly	3.43	3.45	3.47	3.48	3.50	3.52	3.54	3.56
Age of Beneficiary	18	19	20	21	22	23	24	25
Annual	42.43	42.70	42.99	43.29	43.60	43.93	44.27	44.63
Monthly	3.59	3.61	3.63	3.66	3.68	3.71	3.74	3.77
Age of Beneficiary	26	27	28	29	30	31	32	33
Annual	45.01	45.40	45.81	46.25	46.70	47.19	47.69	48.22
Monthly	3.80	3.84	3.87	3.91	3.95	3.99	4.03	4.07
Age of Beneficiary	34	35	36	37	38	39	40	41
Annual	48.77	49.36	49.98	50.63	51.31	52.01	52.74	53.51
Monthly	4.12	4.17	4.22	4.28	4.34	4.39	4.46	4.52
Age of Beneficiary	42	43	44	45	46	47	48	49
Annual	54.27	55.06	55.90	56.78	57.71	58.69	59.72	60.79
Monthly	4.59	4.65	4.72	4.80	4.88	4.96	5.05	5.14
Age of Beneficiary	50	51	52	53	54	55	56	57
Annual	61.92	63.09	64.32	65.60	66.93	68.31	69.73	71.20
Monthly	5.23	5.33	5.44	5.54	5.66	5.77	5.89	6.02
Age of Beneficiary	58	59	60	61	62	63	64	65
Annual	72.72	74.27	75.85	77.45	79.07	80.70	82.32	83.93
Monthly	6.14	6.28	6.41	6.54	6.68	6.82	6.96	7.09
Age of Beneficiary	66	67	68	69	70	71	72	73
Annual	85.52	87.07	88.57	90.02	91.40	92.70	93.91	95.02
Monthly	7.23	7.36	7.48	7.61	7.72	7.83	7.94	8.03
Age of Beneficiary	74	75	76	77	78	79	80 and over	
Annual	96.02	96.90	97.76	98.59	99.38	100.02	100.52	
Monthly	8.11	8.19	8.26	8.33	8.40	8.45	8.49	

The income under Option A or the income during the instalments-certain period under Option B or C, after the first year, will be increased annually by such surplus as may be awarded by the Board of Trustees. Upon the death of any beneficiary, any unpaid instalments under Option A or unpaid instalments-certain under Option B or C, or the commuted value thereof, calculated upon the basis of 3 per cent. per annum compound interest, will be paid as agreed upon in the election of the option.

Options B and C are based on the age of the beneficiary at last birthday and are not available when an association, firm or corporation is beneficiary or assignee.

OPTION D. INTEREST INCOME ON THE NET PROCEEDS payable for such a period as may be agreed upon in the election of this option.

OPTION E. INCOME OF A FIXED AMOUNT PAYABLE UNTIL THE NET PROCEEDS AND INTEREST PAYMENTS TO BE ADDED THERETO ARE EXHAUSTED, the final payment to be the balance then remaining with the Company.

Under Options D and E, the net proceeds are left with the Company at interest at the rate of 3 per cent. per annum, increased annually by such additions as may be awarded by the Board of Trustees, and the income may be made payable annually or in equivalent equal semi-annual, quarterly or monthly payments commencing at the end of the first interest period, with a further payment for the period elapsing between the last regular payment and the date of death of the beneficiary. Payments of principal and interest shall be subject to such provisions as may be agreed upon in the election of either of these options.

Exhibit C

No. 6M-01

[Stamped on face]: Disability Claim Examined.

1191014
No.Ed. 3-24

APPLICATION FOR INSURANCE IN
THE PENN MUTUAL LIFE INSURANCE COMPANY
OF PHILADELPHIA, PA.

1 A. Name in Full (please print)
James McCulloch Jr.

B. Residence Address

No. Street	City	County	State
4275 Ingleside Ave,	San Diego,		Calif.

C. If in County

....Miles.... Direction
R.F.D. From Above City.

How Long Have You Resided at Present Address?
9 Years

D. Business Address

No. Street	City	County	State
914 Beech	San Diego,		Calif

E. Send Premium Notices to
914 Beech St. San Diego, Calif.

4 A. When and Where Were you Born?

Place	County	State
Baltimore		Md.

B.

Day	Month	Year	Age Nearest Birthday
6	Dec.	1893	32

5. Are You (Indicate by X)
Married X Single.... Widower.... Widow....

6 A. What Other Insurance Have You on Your Life?

Company		Amount
Metropolitan	20 Pay Life	16,000.00
Acasia	" " "	5,000.00

F. If Married Woman, Give
Maiden Name Husband's Name

G. Places of Residence Last Five Years
San Diego, Calif.

H. Do You Intend to Change Residence or Travel Outside the U. S.? (Give Details)
No.

I. Are You Engaged in Military or Naval Service? No
Do You Intend so to Engage? No

J. Are You Engaged in Aeronautics or Submarine Service? No
Do You Intend so to Engage? No

2 A. Occupation (State Kind of Business)
Proprietor and Superintendent McCulloch Hospital

B. Occupation During the Last Five Years
As Above

C. Any Change of Occupation Contemplated, Either Temporary or Permanent? (Give Details) No

B. Have You Ever Applied to Any Company or Agent Without Receiving a Policy of the Exact Kind and Amount Applied for? No

C. Are Any Applications Now Pending (Give Details) No

7 A. Sum to Be Insured
$10,000.00
B. Plan
OLRE

C. Premiums Payable
√Annually
Semi-Annually
Quarterly

D. If Disability Benefits Desired, Indicate by X
Disability Waiver of Premium ....
Disability Waiver of Premium and Annuity X
Double Indemnity X

8. How is Surplus to Be Used?
(Rule out Those Not Desired)
To Reduce Premiums
To Increase Amount Insured

3 A. To Whom Shall Policy Be Made Payable? Anna R. McCulloch
If Said Beneficiary Outlives me, Otherwise to My Estate

B. Address San Diego, Cal. 4275 Ingleside Ave.

C. Relationship Wife

D. Beneficiary's Date of Birth
June 1st, 1893

E. Do you Reserve the Right to Change Beneficiary?
Yes

F. If Beneficiary Is Married Woman, State Maiden Name Rogan
Husband's Name

To Accumulate at 3% Interest
√To Accelerate Maturity

9. What Settlement, If Any, Was Effected for Premium on Policy Hereby Applied For? Note

Remarks (Use This Space for Beneficiary Provisions, Preliminary Term Premiums, Etc.)

....

....

For Home Office Endorsements Only

....

[On Margin]: NOTICE—THE FULL NAMES of all persons must be written and signed plainly and distinctly. Names must not be abbreviated. Every question must be fully answered. When a Creditor insures the life of a Debtor, both must sign.

My statements and answers to the questions printed above, and my statements and answers made and given to the Company's Medical Examiner, are full, complete and true. Upon them I base my application for insurance, and agree that they shall be regarded as a part of

the contract if and when issued. If the premium on the insurance herein applied for is not paid at the time of making this application, the contract of insurance shall not be in force unless or until a policy shall be issued and delivered to me and the first premium thereon actually paid during my lifetime and good health. If settlement is effected in accordance with the attached receipt at the time of making this application, the policy shall be in force as of the date of such settlement, provided the application is approved by the Company at the Home Office. The policy if and when issued and delivered to me, shall be in the form now in use by the Company. I understand that neither agents nor examiners have any authority to modify, alter or enlarge contracts. The foregoing agreements and declarations are made on behalf of myself and of any beneficiary under any policy on my life issued by the Company upon this application. 130473 to 130475

My acceptance of any policy issued on this application will constitute a ratification by me of any correction in or addition to this application made by the Company and noted in the space provided for "Home Office Endorsements Only."

In Witness Whereof, the applicant has hereunto subscribed his name. Dated at San Diego the 29 day of September 1925

Witness Present:

Don C. Carrell .... Signature of the person proposed for insurance. Sign the Names in full. James McCulloch, Jr. ....

No. 434230

QUESTIONS TO BE ANSWERED BY THE PERSON TO BE INSURED

Name of Applicant James McCulloch Jr. Examined 11 A. M. This 30th Day of Sept. 1925.
(Write name in printed letters)

At San Diego, County of San Diego State of Calif. Residence 4275 Ingleside
Do you Contemplate Any Change of Residence or Occupation? No Date of Birth? Dec. 6, 1893 Name of Agent? D. C. Carrell Henking & Randolph

10. A.		Age if Living	State of Health	Age at Death	Cause of Death	Duration of Fatal Illness
Father		89	Good			
Mother				57	(Gall Bladder√ (Acidosis from (Operation	3 days√
Full Brothers	How Many Living 2	17-29	Both Good			
	" " Dead? 0					
Full Sisters	How Many Living 1	27	Good			
	" " Dead 0					

Wife or Husband's Age If Living	State of Health	Age at Death	Cause of Death
31	Good	—	—

Ages Attained:	Father's Father	Father's Mother	Mother's Father	Mother's Mother
	D.K.	D.K.	D.K.	D.K.

(B) Has any near relative, uncles, aunts and grandparents included, had tuberculosis (consumption), cancer, apoplexy or Bright's disease. Explain fully. No.

If the family history shows a lack of longevity, give number and ages of uncles and aunts. See Note 6.

Question	Answer
11 A. Are you now in good health? B. When were you last attended by a physician or consulted one? C. For what disease?	A. Yes. B. 1920. C. Crushed lt. middle finger
D. Give details in full.	D. Caught finger in bearing of auto.
E. Give name and residence of the physician who attended you.	E. Dr. Mott Arnold. Front & Spruce Sts., City
F. Give name and residence of your medical adviser, or family physician, to whom you now refer for a certificate, if deemed necessary.	F. None
G. Has any physician ever given an unfavorable opinion of your insurability after either a formal or an informal examination?	G. No
H. Has any physician ever advised you to try a change of climate?	H. No
12. A. Have you ever been ruptured? B. Have you a hernia now? C. If so, do you now wear a suitable truss? D. Do you agree to wear one while insured in this company? Note 7.	A. No B. No C. — D. Yes—if necessary

Question	Answer	
13. A. Do you now use intoxicating liquors? B. To what extent?	A. No	B. None
C. Have you ever used intoxicating liquors to excess? If so, explain the duration and extent of excess, and when last.	C. No	
D. Have you ever taken a cure for inebriety? Note 6.	D. No	
14. Have you ever used opium, morphia, chloral or any narcotic, unless regularly prescribed by a physician? If so, explain fully.	No	
15. A. Have you had insanity, apoplexy, palsy, vertigo, convulsions, sunstroke, congestion, inflammation, or any other disorder of the brain or nervous system?	A. No	
B. Have you had asthma, consumption, spitting of blood, habitual cough and expectoration, palpitation, or any disease of the throat, heart or lungs?	B. No	
C. Have you had appendicitis, indigestion, biliousness, cancer, or any tumor, pellagra, chronic diarrhoea, ear discharge, dropsy, fistula, gall-stones or gravel,	C. No	

renal or hepatic colic, open sores, inflammatory rheumatism, gout, syphilis or stricture, or any disease of the liver, kidneys, or bladder? Notes 8 and 9.	
D. Have you any defect in hearing, in vision of either eye, any malformation or varicose veins?	D. No
E. Are you now, or have you recently been associated with a person who has or has had consumption?	E. No
16. Have you ever had illness, disease, injury or operation other than as stated by you above? If so, give full particulars, date, duration, severity, etc., of each. Use reverse side if necessary.	Yes, fract. rt. forearm—both bones above wrist—complete recovery.

I Hereby Agree, That all the foregoing statements and answers, made to the Company's Medical Examiner, are a part of my application for insurance, are declared to be full, complete and true, and are offered to the Company as a consideration for the Contract.

Witnessed by the Examiner H. S. Anderton, M. D.

Signature of the person proposed for insurance James McCulloch, Jr.

[On Cover]: COPY

No................

THE
PENN MUTUAL LIFE
INSURANCE COMPANY
PHILADELPHIA

NAME OF INSURED

JAMES MC CULLOCH, JR.

ORDINARY LIFE RATE
ENDOWMENT POLICY

ANNUAL DIVIDENDS

TOTAL AND PERMANENT
DISABILITY BENEFITS

PROVIDING FOR
WAIVER OF PREMIUM

Amount, $5,000.00

Date of Policy, November 27th, 1925

Yearly Payment, $122.50

During the Continuance of this Policy
Payable..Annually
Due the 27th day of November

[Endorsed]: Filed Nov. 4, 1929 R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

MEMORANDUM

Being engaged in the trial of an extended jury case, attention to which precludes a detailed elucidation, within a reasonable time, of the reasons which we reach after a careful consideration of the facts and law of this case, and which direct, in our judgment, findings and decree for the defendant herein, this somewhat sketchy Memorandum is offered for the information of counsel, that progress in this cause may not be unduly delayed.

Under Northern Assurance Company vs. Grand View Building Association, 183 U. S. 204, as the doctrines of that decision are amplified and applied, under various sets of circumstances in subsequent Federal cases, we find that the several contracts were reasonable and unambiguous respecting those terms pertinent to the instant inquiry; and that plaintiff by his possession of the same, was charged with knowledge of the fact that he could not obtain the benefits of the total disability clause unless he paid the premiums or was excused, from so doing by condition of the policies.

We find also that, while it may not be that the exact nature of his illness in July, 1926, was made known to him, the circumstances thereof were so distinctly within his knowledge that he was chargeable with a duty to bring that condition to the attention of the Company to make it available at any time, as a reason why he should not promptly pay premiums or the obligations given against them.

The complaint is very much enlarged by charges against the defendant and its agents of duress, intimidation, and

imposition by them, and other harrassments of plaintiff when sick; expressed in many forms and which, it is alleged, affected his conduct prejudicial to his rights. We find the proof utterly lacking in these respects; that there is no justification whatever in the record for any of these charges; and that, on the contrary, it is evident that the Company, through its agents, was extraordinarily lenient in carrying the policies and in overlooking the defendant's failure to either pay, when due, the premiums or the obligations he had entered into to meet them; that such consideration by defendant and its agents rebuts, effectively, any reasonable inference that defendant sought to escape the burdens of the policy contracts.

We find specifically that there was no overreaching of the plaintiff in any way when, in December, 1926, and in March, 1927, he surrendered his policies and gave the several surrender notes in evidence; and that each of such surrenders effectively and permanently terminated any responsibility to plaintiff from defendant, growing out of the several contracts theretofore subsisting. Plaintiff was clearly in default for payment of the first year's premiums on the November, 1925, policies when, December 30, 1926, he executed Notes Policy Surrender of that date, and the same default situation as to the October policy when it was likewise surrendered, March 18, 1927, had already ripened. The plaintiff is apparently mistaken in his testimony that the surrenders were contemporaneous with the execution of the $339.39 note to Carrell. The date of that transaction was April 19, 1927. Then Carrell, individually, had a claim against plaintiff through plaintiff's defaults which had involved Carrell into a debt to his principal for the charges for term insurance.

The testimony for the defense by Cornell leaves no foundation for a conclusion that the March 18 transaction was the result of duress.

Plaintiff was in default as soon as his post-dated February 24 check was dishonored. Thereafter plaintiff was powerless to enforce the policy and the only office of the Note Policy Surrender of March 18 was to evidence that situation. Even if duress in obtaining it were clear, still that would not affect the stability of the already accrued defaults.

We find our judgment of the plaintiff's bona fides herein somewhat affected by the implications in the record that he was attempting to carry an amount of insurance, $51,000.00, represented by the three policies in question, and the contracts from other companies, which called for carrying charges evidently beyond his ability to meet, of which fact, it seems to us, he should have been cognizant; and that seems to the Court to be the only motivating reason why he surrendered those involved in this case. It may be that, until a year later, he was ignorant of the exact nature of his illness in July, 1926, and was still unadvised when he applied for disability privileges to the other insurance organizations. Still, it is obvious that when, as he says, he was fully enlightened in midsummer of 1927, he should have diligently pressed his alleged claims upon the already surrendered Penn Mutual policies. Assuming that he had a reasonable time after this alleged discovery to press his present claims, to wait nearly two years, as he did, to proceed under contracts which he had surrendered after default in paying the premiums or premium notes, was unreasonable. That delay is, in itself, a complete answer, in our judg-

ment, to his present claim that the surrenders were affected through the agents of the company taking advantage, in the early part of 1927, of his physical difficulties. Such delay, inexcusable from any standpoint in our judgment, so worked to the disadvantage of defendant because of the intervening disability of its principal witness, Carrell, as to make the present claim stale and to establish a complete defense of laches independent of the mere length of time.

Another feature of this case which has, we think an important office, is the character of his application in February, 1927, to reinstate his policies in the defendant company. Therein, over his signature, he said (Ex. Defendant's D) that he was then in good health and while in answer to a question whether he had had any sickness since November 24, 1925, he had answered truthfully, "Yes", yet the document carries, in the Certificate of Health from the medical examiner under the head of "Remarks", a statement that he had suffered from "Lobar Pneumonia—1926 2 Mo. disability—complete recovery—no complications", and it is reasonably inferable, considering the entire document, that this statement was substantially that which he made to the examiner, Dr. Anderton, in response to the direction to give full details of the intervening sickness which he had admitted. If his present statements can be accepted as to what was his physical condition in the early part of 1927, and if his averments in his complaint respecting this situation were made in good faith, the same characterisation cannot be attributed to the application for reinstatement.

We are further of the opinion that the testimony of the medical experts does not sustain the burden of proof

upon the plaintiff to show that his total disability eventuated in July, 1926, and continued until his illness in April, 1927. This testimony, in our judgment, sustains his representation to the defendant company in Exhibit Defendant's "D", that he had recovered from that illness with no complications which involved total disability. In fact, if he had suffered as he claims to have suffered continuously thereto and beyond the time when he surrendered the policies involved in this case, we think his representation to the Metropolitan Life Insurance Company and the Acacia Association, in his applications for total and permanent disability benefits, that the date of the beginning of the illness causing his then condition was about April 10, 1927 (Defendant's Ex. E and S; see, also G) was so inconsistent with his present claim as to throw doubt upon his bona fides in making them.

In general, it is the Court's opinion that under all of the circumstances of proof, illuminated by the extravagant character of the Complaint, it is asking too much of a Court of Equity to thrust upon the defendant the burdens of these total disability clauses upon the claims therefor so belated as to justify the conclusion that they were mere afterthoughts.

Plaintiff appeared to the Court as a person of considerable intelligence and one sufficiently acute to have reasonably considered (when he determined, in 1927, to demand relief from the other two companies for a disability which he averred had commenced about two months before) that his disability then was an acute manifestation of a condition which had subsisted since July, 1926,—if there was, in fact, any connection between the illnesses,—and to have been then so impressed with a belief in the responsibility

of defendant to him under the surrendered policies that expedition in pressing his present claims rather than to delay for two years more should have been distinctly in his mind. His business as manager of a hospital was such that he should have been able to more clearly understand his condition of health than one of equal intelligence in the same physical situation, but engaged in a pursuit less illuminating in its contacts.

Counsel may present findings of fact and law, and a decree for defendant consistent with the foregoing observations.

John M. Killits

[Endorsed]: Filed Apr 21 1931 R. S. Zimmerman, Clerk By Francis E Cross, Deputy Clerk.

[Title of Court and Cause.]

FINDINGS OF FACT and CONCLUSIONS OF LAW.

BE IT REMEMBERED that the above entitled and numbered action came on regularly for hearing on the 26th day of February, 1931, in the Courtroom of the Honorable John M. Killits, said Honorable John M. Killits, judge of said court, presiding therein; that at the time of said trial Messrs. Wright & McKee and Cyrus M. Monroe, Esquire appeared as solicitors for plaintiff, and Messrs. O'Melveny, Tuller & Myers and Messrs. Stearns, Luce & Forward, by J. R. Girling Esquire and Fred Kunzel Esquire of counsel, appeared as solicitors for defendant; that it appeared to the court from the files in said action that the defendant had been duly and regularly served with a copy of plaintiff's subpoena and bill, and

had filed its answer; that a trial of said action on the issues thus made and joined was duly had, and evidence both oral and documentary was adduced for and on behalf of plaintiff and defendant, and said court, having heard and considered the evidence and having taken the case under submission for determination and having examined and considered the briefs of the plaintiff as well as the brief of the defendant thereafter submitted to the court in lieu of argument, and being fully advised in the premises now makes its

FINDINGS OF FACT.

-I-

That all the allegations contained in Paragraph I ot plaintiff's complaint are true.

-II-

That all the allegations contained in Paragraph II of plaintiff's complaint are true.

-III-

That the allegations contained in Paragraph III of plaintiff's complaint are true; except that said policy of insurance number 1191014, in order to become effective as respecting payment of permanent and total disability benefits to the insured, the plaintiff, required by its terms that the waiver of premiums and permanent disability payment features thereof were to start upon the date of the receipt by the company, the defendant, at his home office, during the lifetime of the insured, of due proof of total and permanent disability; and further, that said disability provisions and/or benefits should terminate upon any default in the payment of any premium; and further, that by the terms of said policy of insurance it was

agreed that the payment of premiums thereon would only be waived after the receipt of due proof of total and permanent disability of the insured, and during the continuance of such total and permanent disability of the insured.

-IV-

That the allegations contained in Paragraph IV of plaintiff's complaint are true; except that it is not true that before the second anniversary date of said premium, and, to-wit, on July 31, 1926, and before the sixtieth anniversary of the age of the insured, plaintiff was taken sick and became ill with a bodily ailment and disease, to-wit, pulmonary tuberculosis; that it is not true that plaintiff was compelled to remain confined to his home from July 31, 1926, until April 9, 1927; that it is not true that plaintiff was confined to his bed and compelled to remain therein from April 9, 1927, to the latter part of August, 1927; That it is not true that in consequence of said illness and disease plaintiff became or was permanently and totally disabled from engaging in any occupation whatsoever for remuneration or profit. That it is not true that said disease, independently from all other causes, and within the terms of said insurance, has resulted in permanent disability, wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from July 31, 1926, continuing to the date of filing of plaintiff's bill.

-V-

The court finds, as to the allegation contained in Paragraph V of plaintiff's complaint, that it is true that on November 14, 1926, plaintiff made, executed and delivered to defendant his certain promissory note in the

sum of $275.60, the same bearing interest at the rate of six per cent per annum, in payment of the premium due on said policy of insurance No. 1191914 on October 14, 1926, and that the due date of said promissory note was February 14, 1927; that it is not true that the giving and accepting of said note continued said policy No. 1191014 and the benefits thereunder, in force, to October 14, 1927; that it is true that said note was not paid when due; that it is true that said note was returned to plaintiff upon March 18, 1927, and said policy of insurance cancelled; that it is true that defendant's agency at San Diego, California, paid out term insurance on said policy of insurance No. 1191014 in the sum of $42.98 for the period from October 14, 1926, to March 18, 1927. That it is true that at said time (November 14, 1926) plaintiff was further insured by defendant in the sum of $20,000.00, represented by two certain policies of insurance numbers 1196773 and 1196774, issued to plaintiff by defendant; that it is not true that at or about the same time (November 14, 1926,) plaintiff, in payment of the premiums on said last two mentioned policies of insurance, made and delivered, at the request of defendant's said agent in the City of San Diego, California, a post-dated check in the sum of $300.00; that it is true that when said policies of insurance numbers 1196773 and 1196774 were issued upon October 27, 1925, plaintiff gave a note for the first annual premiums thereon in the sum of $551.20; that it is true that said note was due March 25, 1926; that it is true that said note was never paid; that it is true that said policies of insurance lapsed for non-payment of premium on each policy upon October 27, 1926, and were carried in force by defendant

until November 28, 1926, the expiration of the grace period of each; that said policies, and each of them were surrendered by plaintiff as respects the benefits of each policy, upon December 30, 1926, and plaintiff's said note returned to him. That it is true that in February, 1927, plaintiff gave to defendant's agent a post-dated check for $300.00. That it is not true that shortly after the date mentioned in said check, as its due date, or at any time, the general agent of the defendant corporation in the City of San Diego, California, threatened plaintiff with criminal prosecution for the issuance and non-payment of said check and delivered said check over to the District Attorney of the County of San Diego, California, for criminal action and prosecution thereon.

That it is not true that plaintiff, because of his said illness and disease, being unable to follow or engage in any occupation for remuneration or profit, was unable to pay said note and said check when due, respectively.

That it is not true that defendant, by and through its general agent and representative in San Diego, California, wrongfully and fraudulently demanded the return and surrender of said policies of insurance #1196773 and #1196774 and/or policy number 1191014 and/or threatened plaintiff with further, or any, criminal prosecution should he fail or refuse to so surrender said policies of insurance to defendant.

That it is not true that plaintiff, being extremely ill and suffering with disease and/or believing that he would be criminally prosecuted should *be* fail or refuse to surrender said policies of insurance to defendant and/or laboring under duress and/or illness and/or without knowledge and information as to his rights under said

policies of insurance numbers 1196773, 1196774 and 1191014, surrendered and delivered said policy of insurance No. 1191014 to defendant's agent on or about March 8, 1927.

That it is true that upon March 18, 1927, plaintiff surrendered to defendant said policy No. 1191014 and executed a note policy surrender in respect to the same; that at said time plaintiff received from defendant all notes given as premium for said policy.

-VI-

That the allegations of Paragraph VI of plaintiff's complaint are true; except that plaintiff was advised of his true condition and the true and exact nature of his illness and disease prior to June 13, 1927. That it is not true that plaintiff was stricken with pulmonary tuberculosis on July 31, 1926, the date of his first confinement to his bed; that it is not true that because of fraud and duress practiced upon plaintiff and/or because plaintiff was not in possession of said policies of insurance and/or in ignorance of the disability features therein mentioned that plaintiff was unaware of the requirements of his policy of insurance No. 1191014 relative to notice and proofs in the event of permanent and total disability until on or about April 10, 1929. That it is true that plaintiff had been in possession of said policy No. 1191014 from October 14, 1925, until its surrender on or about March, 1927.

-VII-

The court finds as to the allegations contained in Paragraph VII of plaintiff's complaint that it is not true that the defendant corporation refused to permit plaintiff to file a claim for plaintiff's alleged disability; that it is

true that defendant refused to pay plaintiff any disability benefits arising under said policy of insurance No. 1191014, to-wit, the sum of $100.00 per month from July 31, 1926 and thereafter; that it is true that no payments under said policy of insurance No. 1191014 were due to plaintiff in accordance with the terms and provisions of said policy of insurance; that it is true that on March 26, 1929, a letter from plaintiff, constituting plaintiff's first claim for disability benefits under the provisions of Policy No. 1191014, was received by defendant, and that at said time said policy of insurance was no longer in force by reason of its having lapsed for non-payment of premiums and a note policy surrender of the same having been executed by plaintiff cancelling and surrendering all of plaintiff's rights or benefits thereunder upon March 18, 1927.

-VIII-

The court finds as to the allegations contained in Paragraph VIII of plaintiff's complaint that plaintiff has not duly performed, or performed at all, all the conditions of said policy of insurance No. 1191014 on his part to be performed; that it is not true that there is due, owing and unpaid by defendant to plaintiff the sum of $3700.00 together with interest thereon as of September 1, 1929, and/or thereafter at the rate of $100.00 per month during the period of plaintiff's disability. That it is true that plaintiff did not during the period of time when said policy of insurance was in force and/or effect submit any proof of disability and/or claim for benefits under said policy to defendant. That it is true that said policy of insurance No. 1191014 lapsed by reason of non-payment by plaintiff of the premiums due thereon.

-IX-

That all of the allegations contained in Paragraph IX of plaintiff's complaint are true.

-X-

That none of the allegations contained in Paragraph X of plaintiff's complaint are true; except that on or about about November 27, 1925, at the City of San Diego, County of San Diego, State of California, plaintiff made, executed and delivered to defendant his certain promissory note in the sum of $551.20, bearing interest at the rate of 6% per annum, in payment by plaintiff to defendant of the first annual premium upon policy No. 1196773 and policy No. 1196774, in consideration of which defendant made and delivered to plaintiff its said policies of insurance numbered as aforesaid, agreeing to pay to the beneficiary named in policy No. 1196773 the sum of $5,000.00, and to the beneficiary named in policy No. 1196774 the sum of $15,000.00, upon the death of plaintiff.

-XI-

That the allegations contained in Paragraph XI of plaintiff's complaint are true; except that said policy of insurance No. 1196774, in order to become effective as respecting permanent and total disability of the insured, the plaintiff, required by its terms that the income or permanent disability features thereof were to start upon the date of the receipt by the company, the defendant, at its home office, during the lifetime of the insured, due proof of total and permanent disability; and further, that said disability provisions and/or benefits should terminate upon any default in the payment of any premium; and further, that by the terms of said policy of insurance it was

agreed that the payment of premiums thereon would only be waived after the receipt of due proof of total and permanent disability of the insured, and during the continuance of such total and permanent disability of the insured.

-XII-

That the allegations contained in Paragraph XII of plaintiff's complaint are true; except that it is not true that before the second policy anniversary of said life insurance policy No. 1196774, and on July 31, 1926, plaintiff was taken sick and became ill with pulmonary tuberculosis; that it is not true that plaintiff was confined to his home for a period which commenced nine weeks after July 31, 1926, or was confined to his bed and compelled to remain there during the period from April 9, 1927, to the latter part of August, 1927; that it is not true that in consequence of plaintiff's illness, commencing upon July 31, 1926, plaintiff became, was and is permanently and totally disabled from engaging in any occupation whatsoever for remuneration or profit. That it is not true that said disease, within the terms of said contract of insurance, has resulted in permanent disability wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from and since July 31, 1926, to the date of the filing of plaintiff's bill.

-XIII-

That none of the allegations contained in Paragraph XIII of plaintiff's complaint are true; but that it is true that said policy of insurance No. 1196774 lapsed for non-payment of premium upon October 27, 1926; that defendant continued said policy of insurance in force until November 28, 1926, which included the grace period upon

said policy of insurance. That it is true that said policy of insurance was surrendered by plaintiff upon December 30, 1926, to defendant, at which time the note given by plaintiff as the first year's premium thereon was returned to plaintiff.

-XIV-

That all of the allegations contained in Paragraph XIV of plaintiff's complaint are true; except that plaintiff was advised by his physician that he was suffering from tuberculosis prior to June 13, 1927; that it is not true that plaintiff had been suffering, or was stricken with pulmonary tuberculosis on July 31, 1926; that it is not true that plaintiff had been prior to on or about April 10, 1927, suffering with pulmonary tuberculosis, or that he had been prior to April 10, 1927, totally and permanently disabled from engaging in any occupation for remuneration or profit; that it is not true that because plaintiff was not in possession of said policy of insurance, or because of fraud and duress practiced upon plaintiff by the defendant's agent and representative, plaintiff was in ignorance and unaware of the requirements of said policy of insurance relative to notice and proof; that it is not true that plaintiff did not become aware that he was suffering from a disability until on or about April 10, 1929; that it is not true that the failure of plaintiff to have possession of the policy No. 1196774 was due to any fraud and/or duress practiced upon plaintiff by defendant or any of its agents; that it is not true that plaintiff was in complete ignorance of the disability features mentioned or contained in said policy of insurance; that it is not true that plaintiff was not aware of the requirements of said policy of insurance relative to notice and proofs to be furnished

to defendant in the event of total and permanent disability of plaintiff.

That it is not true that said policy of insurance, upon July 6, 1927, covered plaintiff, and would enable plaintiff to be entitled to the benefits mentioned and recited in said policy of insurance. That it is true that said policy of insurance was surrendered by plaintiff and a note policy surrender executed by plaintiff respecting the same upon December 30, 1926. That it is true that said policy of insurance, by its terms, lapsed for non-payment of premiums upon November 28, 1926. That it is true that plaintiff had in his possession policy of insurance No. 1196774 from and after October 27, 1925, the date when it was issued, until and including December 30, 1926, the date when said policy of insurance was by plaintiff surrendered and/or the benefits thereof released.

-XV-

The court finds as to the allegations contained in Paragraph XV of plaintiff's complaint, that none of the allegations therein contained are true, except that it is true that defendant failed and refused to pay plaintiff the disability benefits mentioned and recited in said policy of insurance, to-wit, the sum of $150.00 per month from July 31, 1926, and/or thereafter. That it is true that plaintiff wrote a certain letter or claim received by defendant on March 26, 1929, and that on said date, March 26, 1929, said policy of insurance No. 1196774 was not in force and effect for the reason that said policy of insurance had lapsed for non-payment of premium and plaintiff, by the execution of a form of note policy surrender had, upon December 30, 1926, released and surrendered all his rights under said policy of insurance in considera-

tion of the return to him of his unpaid promissory note in the principal sum of $551.20, given by him on or about November 27, 1925, to defendant for premiums upon said policy of insurance, together with policy of insurance No. 1196773.

-XVI-

That none of the allegations contained in Paragraph XVI of plaintiff's complaint are true; but that it is true that plaintiff never submitted to defendant any claim in respect to disability under the provisions of said policy of insurance No. 1196774 while said policy of insurance was in force and/or effect. That it is true that plaintiff never paid to defendant any premium upon said policy of insurance No. 1196774.

-VII-

That all the allegations contained in Paragraph XVII of plaintiff's complaint are true.

-XVIII-

That all the allegations contained in Paragraph XVIII of plaintiff's complaint are true; except that said promissory note in the sum of $551.20 was tendered to defendant by plaintiff for the payment of premiums upon policies of insurance numbers 1196773 and 1196774.

-XIX-

That the allegations contained in Paragraph XIX of plaintiff's complaint are true; except that by the terms of said policy of insurance No. 1196773 the agreement to waive payment of premiums in respect to said policy of insurance was only effective from and after receipt of due proof by defendant of permanent, total disability of plaintiff, the insured, during the life of said policy of insurance, without default in payment of premiums.

-XX-

That the allegations contained in Paragraph XX of plaintiff's complaint are true; except that it is not true that before the second anniversary of said policy, and on or about July 31, 1926, plaintiff was taken sick and became ill with a bodily ailment and disease, to-wit, pulmonary tuberculosis; that it is not true that plaintiff was confined to his bed and compelled to remain therein from April 9, 1927, to the latter part of August, 1927; that it is not true that said disease, independently from all other causes, and within the terms of said contract of insurance, has resulted in permanent disability from July 31, 1926, to the date of the filing of plaintiff's bill herein.

-XXI-

That none of the allegations contained in Paragraph XXI of plaintiff's complaint are true.

-XXII-

That the allegations contained in Paragraph XXII of plaintiff's complaint are true; except that plaintiff was not advised by his physician that he had tuberculosis on or about July 6, 1927, but was so advised prior to April 10, 1927; that it is not true that plaintiff was advised that he was stricken with pulmonary tuberculosis on July 31, 1926; that it is not true that plaintiff was stricken with tuberculosis on July 31, 1926; that it is not true that because of any fraud or duress practiced upon plaintiff by defendant's agent and/or representative plaintiff was unaware of the disability provisions in said policy of insurance and/or the requirements of said policy of insurance relative to notice and proof to be furnished defendant; that it is not true that plaintiff first knew the requirements of said policy of insurance relative to notice

and proof in the event of total and permanent disability and/or was unaware of the disease and illness with which he was suffering until on or about April 10, 1929; that it is not true that the failure of plaintiff at any time to have possession of policy No. 1196773 was due to any fraud and/or duress practiced upon plaintiff by defendant or any of its agents. That it is true that plaintiff had been in possession of said policy of insurance No. 1196773 from the date of its issuance upon October 27, 1925, until the date of its surrender upon December 30, 1926.

-XXIII-

That the allegations contained in Paragraph XXIII of plaintiff's complaint are true; except that it is not true that said policy of insurance No. 1196773 was in full force and effect at the time plaintiff requested claim blanks from defendant for the purpose of filing his claim for total and permanent disability benefits on or about March 26, 1929. That it is true that policy No. 1196773 had lapsed for non-payment of premiums on November 28, 1926, and upon December 30, 1926, plaintiff had executed a note policy surrender, surrendering each and all of the benefits under said policy in consideration of the return to him of his unpaid note for $551.20 and the release of his liability under said note. That it is true that plaintiff had never paid any cash as premiums on either the first or second year premiums on said policy of insurance No. 1196773 and/or policy No. 1196774. That it is not true that defendant refused to permit plaintiff to file a claim for disability benefits in respect to said life insurance policy No. 1196773.

-XXIV-

That none of the allegations contained in Paragraph XXIV of plaintiff's complaint are true. That it is true that plaintiff did not submit any claim to defendant as respects the disability of plaintiff under the provisions of policy No. 1196773 while said policy was in force and/or effect. That it is true that plaintiff did not pay to defendant any cash whatsoever as premium for said policy of insurance No. 1196773.

-XXV-

That it is true that defendant, through its agent, was extraordinarily lenient in carrying the three policies of insurance numbers 1196773, 1196774 and 1191014 after plaintiff had failed to pay when due either the premiums or the obligations he had entered into to meet the premiums on said respective policies. That there was no sharp practice, fraud or deceit engaged in by defendant in any way in December 1926, and in March 1927, when plaintiff surrendered to defendant his three said policies of life insurance Numbers 1196773, 1196774 and 1191014, and gave and executed the several note policy surrenders respecting the said policies of insurance. That each of said surrenders definitely and permanently terminated any responsibility of defendant to plaintiff growing out of the several policies of life insurance. That that certain promissory note in the sum of $339.39 executed by plaintiff under date of April 19, 1927, and given to defendant's agent, was executed as an individual mo*en*tary transaction between plaintiff and said agent, and in payment for moneys paid by said agent for the use of plaintiff.

-XXVI-

That plaintiff was duly advised in midsummer of 1927 as to his true physical condition; that plaintiff failed and neglected to present any claim to defendant until March, 1929, and said delay on the part of plaintiff to proceed under the three insurance policies which he had surrendered to defendant's agent after default in the payment of premiums or premium notes was an unreasonable delay; that such delay in presentation of proofs or claims by plaintiff worked to the disadvantage of defendant because of the intervening disability of defendant's agent and principal witness, Carrell; and was such as to make plaintiff's respective claims as to his three demands for disability stale, and to establish the defense of laches interposed by defendant as to each of the three causes of action in plaintiff's complaint, independent of the mere length of time.

-XXVII-

That plaintiff attempted to reinstate said policies of insurance Numbers 1196773, 1196774 and 1191014 in the month of February, 1927, and at said time, in his written application for reinstatement, stated that he had completely recovered from his illness of 1926, to-wit, lobar pneumonia with two months disability. That plaintiff was, prior to 1926, and thereafter, carrying insurance in two other Insurance companies, to-wit, two with or in the Metropolitan Life Insurance Company and one with or in the Acacia Mutual Life Association; that plaintiff applied for the benefits of permanent total disability provisions in respect to each of the policies in the two last named insurance companies; that plaintiff in his application for benefits to Metropolitan Life Insurance Company under

date of August 10, 1927, stated that the date of the commencement of his illness which caused disability was April 20, 1927; that plaintiff stated in his application for disability benefits to Acacia Mutual Life Association under date of March 28, 1928, that he became totally disabled on April 10, 1927. That on said respective dates, August 10, 1927, and March 28, 1928, when plaintiff so made his aforesaid applications for disability benefits to Metropolitan Life Insurance Company and to Acacia Mutual Life Association, plaintiff had surrendered all benefits in and to policies of insurance Numbers 1196773, 1196774 and 1191014.

And from the foregoing Findings of Fact the court now makes its

CONCLUSIONS OF LAW.

-I-

That the complaint of plaintiff should be dismissed with prejudice.

-II-

That plaintiff's causes of action, if any, sued upon in plaintiff's bill, and each and all of them, is barred by the laches of plaintiff.

-III-

That plaintiff, by receiving his policies of life insurance, and each of them, and retaining them until surrendered, knew of the disability benefit provisions contained in them, and each of them, and the requirements as to the submission of proof of permanent and total disability to the defendant in order to obtain benefits under each or any of said policies of insurance.

-IV-

That all rights of the plaintiff in and to each and all of said policies of insurance numbered respectively 1196773, 1196774 and 1191014 were terminated upon the surrender of each of said policies, and said policies were not in force upon the 28th day of March, 1929, when plaintiff first offered proof of any disability in respect to any of said policies.

-V-

That a decree should be entered accordingly.

DONE IN OPEN COURT THIS 14th DAY OF May, 1931.

John M. Killits
Judge of the above entitled court.

Approved as to form as provided in Rule 44.

Wright & McKee
C. M. Monroe
Solicitors for plaintiff.

[Endorsed]: Filed May 19, 1931. R. S. Zimmerman, Clerk, by Thomas Madden, Deputy Clerk.

[Title of Court and Cause.]

DECREE

Pursuant to written Findings of Fact and Conclusions of Law herein made and filed, and on motion of J. R. Girling, Esquire, one of the solicitors for defendant,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff take nothing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's complaint herein be dismissed

with prejudice, and that defendant have and recover its costs of suit expended in this action. Costs taxed at $174.65.

DONE IN OPEN COURT this 14th day of May, 1931.

John M. Killits
Judge of the above entitled court.

Approved as to form as provided by Rule 44.
Wright & McKee
C. M. Monroe
Solicitors for plaintiff.

Decree entered and recorded MAY 19, 1931.
R. S. ZIMMERMAN, Clerk.
By Thomas Madden,
Deputy Clerk.

[Endorsed]: Filed May 19, 1931. R. S. Zimmerman, Clerk, by Thomas Madden, Deputy Clerk.

[Title of Court and Cause.]

ORDER TO SHOW CAUSE

TO PENN MUTUAL LIFE INSURANCE COMPANY OF PENNSYLVANIA, a corporation, defendant, and to MESSRS. O'MELVENY, TULLER & MYERS and MESSRS. STEARNS, LUCE & FORWARD, attorneys for said defendant:

Upon the petition of JAMES McCULLOCH, JR., plaintiff in the above-entitled cause, copy of which petition is attached hereto, and on the motion of plaintiff:

IT IS ORDERED, ADJUDGED AND DECREED that the defendant show cause before the undersigned Judge of the District Court of the Southern District of

California, Southern Division, at his chambers in the Federal Building in the city of Los Angeles, County of Los Angeles, State of California, why a rehearing should not be granted in the above cause.

Service of this order and the papers on which it is granted shall be made upon defendant's attorneys on or before two (2) days from the date hereof.

IT IS FURTHER ORDERED that said petition may be submitted and considered upon written argument, that on behalf of the plaintiff to be filed within 10 days from the date hereof, and defendant's argument in reply to be filed within 8 days thereafter; copies of said written memoranda are to be served upon opposing counsel.

Dated: May 19, 1931

John M. Killits
District Judge

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

JAMES McCULLOCH, Jr., Plaintiff, -vs- PENN MUTUAL LIFE INSURANCE COMPANY OF PENNSYLVANIA, a corporation, Defendant	No A-5-M In Equity PETITION OF PLAINTIFF FOR REHEARING

TO THE HON. JOHN M. KILLITS, Judge of the District Court of the Southern District of California, Southern Division:

The petition of JAMES McCULLOCH, JR., plaintiff in the above entitled cause shows:

1. That on the 13th day of September, 1929, plaintiff herein filed his bill of complaint in this Court alleging that the defendant had issued three (3) certain policies of insurance upon his life; that said policies contained provisions for the waiver of premiums in case of disability and for the payment to plaintiff of disability benefits in case of such total permanent disability; that such disability had accrued during the time when said policies were in force; that the policies had been canceled and surrendered thru mutual mistake and fraud of the defendant company, and praying in substance that the policies be declared to be in full force and effect and that defendant be required to pay disability benefits accruing since July 1926.

2. That on the 4th day of November, 1929, the defendant filed its answer wherein in substance it denied the existence of said total permanent disability during the time the policies were in force; denied that conditions precedent to the obtaining of such benefits had been complied with by plaintiff and alleged that said policies had expired for non-payment of premiums and were no longer in force.

3. That on the................day of May, 1931, the Court rendered a decision and made its written findings of fact and conclusions of law and on the ....day of May, 1931, a decree was entered in said Court in favor of defendant directing that the defendant recover its costs.

4. That the plaintiff believes the decree entered in this cause to be erroneous and he has been aggrieved by said decree in that the same is contrary to the undisputed evidence and said decision, findings and decree were rendered and entered upon a misapprehension of the facts involved in said cause, and particularly in that the Court decided and found that there was no sufficient evidence to establish that the plaintiff became permanently and totally disabled during the time when said policies of insurance were in force, while in truth and in fact it was

established by the positive and uncontradicted evidence of three (3) expert physicians that in July, 1926, and at a time when it was undisputed that said policies were in force, plaintiff became afflicted with pulmonary tuberculosis to the extent that he was totally disabled and incapacitated from carrying on any remunerative occupation and that he had at all times since said date remained totally incapacitated. That said evidence was and is undisputed and was corroborated by both the testimony of the plaintiff and his wife. That the only possible conflict in said evidence arises out of statements made in subsequent applications to insurance companies at a time when plaintiff did not know the cause of his illness and disability, his lack of knowledge of said disability having been established by the positive and uncontradicted testimony of his physician and his wife. That under the law as cited to the Court upon argument, it being established that such disability occurred in the year 1926, all other defenses presented on behalf of defendant are ineffectual and plaintiff is entitled to judgment and decree as prayed for.

WHEREFORE, the petitioner prays that this Court will grant a rehearing of said cause on such terms as to this Court shall seem just.

Dated: May 18, 1931.

A. L. Wissburg
and
WRIGHT & McKEE
By C. M. MONROE
Attorneys for plaintiff

[Endorsed]: Received copy May 19 1931 O'Melveny, Tuller & Myers By (Invalid unless countersigned) R. B. Beat Filed May 19 1931 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

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[TITLE OF COURT AND CAUSE.]

MEMORANDUM OPINION

Killits, J.:

Late in August during our absence from the country the motion for rehearing in this case was forwarded to our office, and the first opportunity to consider the same is now employed. The motion raises no question not thoroughly considered at the time we filed our memorandum supporting the decree April 21, 1931. There is no essential question of fact which was without dispute in the evidence, i. e., as to such a point there was evidence on both sides, and the question raised in the motion is whether the Court should reconsider its judgment on these questions in dispute reached as a result of hearing the testimony and seeing and considering the witnesses. This is especially true with the vital question, whether the complainant had active tuberculosis continuing from his illness in July, 1926, through the following winter, and until after he surrendered the policies. Upon this subject the evidence was in conflict. Aside from that the Court was justified in considering whether or not the defendant, noting him, his environment and vocation, and his physical experiences, should not have known the seriousness of his condition during that period if he had

active tuberculosis, or at least have been put on inquiry in that respect.

In their argument against the motion, counsel for the defendant apologized for the suggestion there made that it is known to medical science that tuberculosis once developed may be finally arrested. That apology was unnecessary. The law of judicial knowledge has been expanded to cover the ascertainments of science, invention and discovery in most of the important lines of human experience. We think we are justified in taking judicial knowledge of the fact well known to the medical world as established that the existence of tubercular scars in the lungs of persons once suffering from that disease, and who are completely cured, is a common occurrence. These considerations are of considerable pertinence when regarded along with plaintiff's representations in the Spring of 1927, especially in his application for reinstatement of the policies in question when it was stated that he was in good health.

An inference may exist, proof of active tuberculosis in 1926, and proof of that condition at an examination some time later being made, that such a condition was continuous, but here there is proof which, accepted, tends strongly to destroy the theory of such continuity. In this case, as we weigh the evidence, the preponderance of the proof is to the effect that the 1926 outbreak was overcome, and that the later development had its origin in the Spring of 1927. It may be that the experience McCulloch

endured in 1926 left him more susceptible to another attack of the disease as a sequel to a new pulmonary illness, but that susceptibility, if it existed, is not a permanent disability, within the meaning of the provisions of the insurance contracts. The defendant is not a charitable organization—it is a trustee for its active beneficiaries, whose interests must be preserved against demands which are not founded upon its contracts with reasonable clarity. This is not a case where sympathy should cloud judgment in the slightest.

The motion is denied, as shown by the accompanying order.

John M. Killits
United States District Judge.

[Endorsed]: Filed Oct 12 1931 R. S. Zimmerman, Clerk By B. B. Hansen Deputy Clerk

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[Title of Court and Cause.]

ORDER

This cause coming on to be heard on the motion of the plaintiff for a rehearing, the same was heard and considered, the Court finding the said motion without merit. WHEREFORE the same is denied.

John M. Killits
United States District Judge.

[Endorsed]: Filed Oct 12 1931 R. S. Zimmerman, Clerk By B. B. Hansen Deputy Clerk

(Testimony of James McCulloch, Jr.)

[TITLE OF COURT AND CAUSE.]

AGREED STATEMENT OF EVIDENCE

BE IT REMEMBERED that the above entitled cause came on regularly for trial before the above Court, sitting in equity, on the 26th day of February, 1931, upon the issues formed by the complaint and answer thereto, Messrs. A. L. Wissburg, Wright & McKee and C. M. Monroe appearing as counsel for plaintiff, and Messrs. O'Melveny, Tuller & Myers, J. R. Girling, and Stearns, Luce & Forward and Fred Kunzel appearing for defendant.

PLAINTIFF'S CASE

JAMES McCULLOCH, JR.,

plaintiff, called as a witnes in his own behalf, testified as follows:

My name is James McCulloch, Jr. I am 37 years of age. In 1925 I was living at No. 4275 Ingleside Drive, San Diego, California. I was operating McCulloch Hospital at that time. Prior to taking out insurance in 1925, I had a conversation with Mr. Randolph and with Mr. Don C. Carrell. They were engaged in the insurance business in San Diego. I took out a policy in October 1925. (Policy identified in evidence and marked Exhibit 1).

(It is stipulated that all policies in regard to this transaction are correctly copied and attached to the exhibits in the Answer of the defendant, and referred to as Exhibits A, B and C.) Policy A is for $10,000. At the time this policy was taken out I executed a note. The

(Testimony of James McCulloch, Jr.)

note was identified by the witness and offered in evidence as Plaintiff's Exhibit 1, which is in words and figures as follows:

"$275.60 September 29, 1925.

"Four months after date I promise to pay to the order of THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, at 504 Union Building, San Diego, Calif., Two Hundred Seventy Five and 60/100 Dollars, without defalcation, value received (account of policy No. 1191014) with interest from...............

Due January 29th, 1926. Signed James McCulloch, Jr., 4275 Ingleside Avenue, City."

504 Union Building is the office of the Penn Mutual Life Insurance Company, Mr. Randolph's office. Mr. Randolph is the agent. I gave the note to Mr. Carrell. I received a receipt when the note was paid.

(Receipt was received in evidence and marked Plaintiff's Exhibit No. 2).

I made a payment on the note 12/12—$150.00. and I subsequently paid the balance of the note. I received a statement showing the balance due on the note prior to making payment of the balance. I identify this (paper) as the statement. (Statement as identified received in evidence, dated April 10th, 1926, showing the balance of the amount of the note, $125.60, and marked Plaintiff's Exhibit 3.) Payment of the balance of the note was made by check (Check was received in evidence and marked Plaintiff's Exhibit 4.) (Check on the First National Bank of San Diego, dated September 10, 1926, to

(Testimony of James McCulloch, Jr.)
the Penn Mutual Life Insurance Company, for $125.60, cancellation as paid as of September 25th, 1926.)

I subsequently took out two other policies, for $15.000 and $5,000. The two were taken out at the same time. (Policies attached to the Answer the $15,000 policy marked Exhibit B and the $5,000 policy marked Exhibit C.) I gave a note at the time of the taking out of those policies. (Note received in evidence, marked Plaintiff's Exhibit 5). (Note dated November 25th, 1925, for $551.20, due March 26th, 1926.) The note was not paid at the time it was due.

I was taken sick July 31st, 1926. I called in Dr. Tanner and I was in bed two or three days and I got up and went to the hospital, about four o'clock that afternoon I was taken down with a violent chill and fever, and was brought back home again. I called the doctor after that and was in bed for a considerable time. I was in bed continuously, I think, to about the middle of September. Dr. Tanner and Dr. Alberty waited on me. They are both doctors of San Diego. At that time I did not know the nature of my illness. I was told the nature of my illness was pneumonia. After July, when I was taken sick, I attempted to take care of my business but I could not. I was unable to do it, and Mr. Whalen was taking care of the business at that time. The business just went from bad to worse, and it failed. I have not done any business since July 1926. I attempted to see what I could do for a couple of days, but I had to go home and go to bed again. I was very weak and was unable to stand it very long. Just a few hours at a time. I had to go home and lie down and was running a temperature every

(Testimony of James McCulloch, Jr.)

day. I was able to stay at the business about an hour. That condition continued ever since that time. The premium notes on those two policies, $15,000 and $5,000 were not paid when it was due, for I was unable to. I did not have the money. I gave a note for the second premium on the $10,000 policy, the first policy, the "A" policy. I think I gave the note to Mrs. Kelly. It was sent down to the office. I think the note was made out by her when I signed it. The note handed me is the note I gave for the second year's premium on Policy A, the $10,000 policy, which was received in evidence and marked Plaintiff's Exhibit 6. The note states "November 14, 1926", for $275.60, payable at the San Diego Agency, and payable to the Penn Mutual Life Insurance Company of Philadelphia. Later on I gave other notes on the other two policies. I paid Mr. Carrell another note covering the other two policies. At the time I gave him that check, I gave him a note for the second year's premium of the other two policies. I never got the note back. It was on the same form as the note you have shown me. With reference to the first year's premium on the other two policies, the $15,000 and the $5,000, I gave Mr. Carrell a check for $300.00. The check was post dated, I think, for fourteen days, and when they put the check in the bank there were no funds to cover it and it was sent back. The check was given in February 1927. I made an appointment and met him at the hospital and gave him the check. I had numerous conversations with Mr. Carrell about the premiums on this insurance policy before giving him the check. Four or five times on the telephone. The check that you hand me is the check

(Testimony of James McCulloch, Jr.)

that I gave to Mr. Carrell. It was a post dated check, given about fourteen days before the date that it bears. (Check introduced which was received in evidence and marked Plaintiff's Exhibit 7.) It is a check on the First National Bank of San Diego for $300. payable to the order of C. L. Randolph and Son. At the time I gave the check he told me if I would give him that much at that time they would arrange to carry the difference in the office and take a renewal note of the premium for the next year. It was to be applied on the first year's premium. On the $5,000 and the $15,000 policies. At the time I gave the check I was unable to work. I was weak and sick. I was again confined to bed in 1927, the first part of April. After I gave Mr. Carrell the check I had a subsequent conversation with him at the house about it. That was some time in March. It was after the check had become due. It was not paid at that time. I failed to meet the payment on the check and it was placed in the hands of Mr. Peterson, an attorney, who wrote me and I called to see him and he demanded payment. I could not give it to him. About a week after that I received a letter from the District Attorney's office. I was interviewed at the District Attorney's office. I was summoned there on account of that check. I saw Mr. Cornell at the District Attorney's office, Mr. Jack Cornell. He had the check at the time he talked with me. I had further conversation with Mr. Carrell at my home about the check. I believe this was sometime in March or April. Mr. Carrell told me he had taken the check up to the District Attorney's office. He said he would prosecute me on it, and various things. I gave him the

(Testimony of James McCulloch, Jr.)
note at the time to cover the check, and he had some figures there on a piece of paper, short rate term, or something, on the policy. I gave him a note to cover what he had been forced to pay by the Company. That is what he told me. This is the note given at the time. (paper handed witness) (Note received in evidence, marked Plaintiff's Exhibit 8). The note is for $339.39, dated April 19, 1927, for 60 days, payable to Don C. Carrell. Signed James McCulloch Jr., and bears the endorsement "Paid in full, March 28, 1930, D. C. Carrell". Mr. *Carrel* put that endorsement on it. When I gave the note Mr. Carrell demanded the surrender of the policy. The policies were given up by me, all three of them.

After that time, I was sick in bed for quite a while, and wasn't getting much better in July I decided to go to the hospital and applied to the Veteran's Hospital for hospitalization. At that time I was informed what was the matter with me. I was informed that I was suffering from tuberculosis. Prior to that time I had not been informed that I was suffering with tuberculosis. I did not know it prior to that time. At the time I gave the notes for the second year's premium on these policies, I did not know the nature of my illness. During the early part of 1927 I understood the nature of my illness to be pneumonia and pleurisy with effucions, fluid in my side. When I was taken down in 1927, I also consulted Dr. Kramer (Ramer). On July 6th, I applied to the Veterans for hospitalization. Dr. Pasche examined and X-rays me at the Navy Hospital. At or about that time he made a report of me to the Metropolitan Life Insur-

(Testimony of James McCulloch, Jr.)
ance Company. It was not in connection with that report that I learned the nature of my illness. He told me outright what my illness was.

The note was due and Mr. Carrell would write me letters and come to see me and trying to collect it, and I received a letter from him demanding payment or he would start suit. I am referred to the last note given to Mr. Carrell given to pay the $300.00 check. I received this letter and called him up and made an appointment. This was the 3rd, or 4th of March 1929. I talked with him and asked him why I should get stuck with this because I had never received any benefits from it. He said "You had been covered, if you had filed your claim you would have received your disability benefits". At that time he gave me the $10,000 policy back with two or three of the notes. That is the time I received back the original $10,000 policy from Mr. Carrell. Up to the time of that conversation, in March 1929, I did not realize that I had any possible claim against the Company for disability for the reason that the policies were not in my possession. I thought it was gone. I had no copies prior to that time. A little later the Company furnished me with copies of the policies at my request. I went to see Mr. Carrell in 1929 in connection with the note and he read over the disability provisions of the policy. I told him then that I felt the policies were in force and I wanted to file a claim. Mr. Randolph was called in and he took the matter up with the Company and they refused to allow me to file a claim. The paper handed me, dated March 14, 1929, I got from Mr. Randolph. He said it was a copy of a communication he had from the home

(Testimony of James McCulloch, Jr.)
office of the Company. (Instrument offered and received in evidence, Letterhead of Penn Mutual Life Insurance Company, dated March 14, 1929, Subject: Disability Claim, James McCulloch, Jr., Policy No. 1191014, S. L. Randolph and Son) and in words and figures as follows:

"Your communication of the 8th, inst. at hand with regard to the above named person's disability. We note that the policy mentioned in your letter was, as you state, forfeited as of October 14, 1926 by reason of non-payment of the premium due on that date. I regret to advise, however, that having failed to file claim for disability benefits while the policy was in force, the insured waived his right to apply for the benefits to which he might have been entitled.

The disability clause plainly provides that total and permanent disability benefits automatically cease upon the default in the payment of any premium. I regret, therefore, that we consequently cannot see our way clear to allow Mr. McCulloch to file claim for disability benefits at this time.

Very truly yours,
Malcolm Adam, Supervisor."

I received a letter from the Company direct in answer to a letter I wrote them. I kept a copy of my letter. This is the copy (witness identifies paper). The other letter you hand me is the answer I received from the Company. (Copy of letter dated March 23, 1929 written by Mr. McCulloch to the Company offered and received in evidence, marked Plaintiff's Exhibit 10.) (Letter dated April 5, 1929 from the Company to Mr. McCulloch of-

(Testimony of James McCulloch, Jr.)
fered and received in evidence, marked Plaintiff's Exhibit 11).

(Exhibit No. 10, offered and received in evidence, dated March 23, 1929, from Mr. McCulloch to the Company, is in words and figures as follows:

"To the Penn Mutual Life Insurance Company,
Philadelphia,
Attention Mr. Malcolm Adam.

Gentlemen:

In reference to your letter of March 14th, to Mr. Randolph, your general agent in this City, in connection with my claim for disability benefits under my policies which was rejected by you.

I wish to state that by reason of the fact that my total disability commenced on July 31st, 1926 and at which time my policies were in full force that I feel and still contend that I am entitled to the reinstatement of my policies and the benefits provided therein.

Owing to my disability since July 31st, 1926, I have been incapacitated from doing any work or to take care of my business, consequently I was unable to meet the premiums on my policies when due. In connection with my delay in filing this claim, I wish to state that owing to the fact that soon after I took sick these policies were demanded of me by your local agent and I did not have same in my possession from that time on. At the time these policies were surrendered to your agent I was sick in bed and your local office was aware of this fact.

So according to this statement I think you should reconsider my application and allow me to present my

(Testimony of James McCulloch, Jr.)

claim. I will also appreciate it very much if you would forward to me photostatic copies of policies #1196773 and #1196774 which were issued to me.

Respectfully yours,

James McCulloch, Jr."

These numbers refer to the $15,000 and the $5,000 policies.

Plaintiff's Exhibit 11, on the letterhead of the Penn Mutual Life Insurance Company, offered and received in evidence, was in words and figures as follows:

"April 5, 1929.

Mr. James McCulloch,
4411 Central Avenue,
San Diego, California.

Dear Mr. McCulloch:

"Your letter to the Supervisor has been sent to me and I have carefully gone over the facts which you write concerning your policies in this Company.

You will recall that you had three policies in the Penn Mutual. Policies Nos. 1196773 and 1196774 were issued on November 27, 1925, both policies containing provisions for waiver of premium in case of total and permanent disability, and policy #1191014 contained a provision for the payment of certain annuities in the event of total and permanent disability. When the first two policies were issued, you gave us your notes for the first year's premium on both policies. However, you never met these notes, which fell due on March 25, 1926, but the Company carried the policies until a year had elapsed, that is, until November 27, 1926, the policy anniversary. You were

(Testimony of James McCulloch, Jr.)
then unable to meet the premiums and the policies were surrendered by you on the 30th of December, 1926.

You state your disability commenced July 31st, 1926. Your notes has fallen due on March 26, 1926, and you had made no effort to pay them off between that time and the date of your disability. Moreover, you did not surrender the policies until December 30th, 1926. Therefore, you had had four months in which to make claim for the disability and waiver of premium benefits. We realize that a denial of a liability by this Company may seem to work a great hardship upon you, but I feel that it would be entirely unfair to our other policyholders if we did not in this case hold to the terms of the policies which require that due proof of disability be submitted before the policies are surrendered and before there has been a default in payment of any premium in order for the disability and waiver of premium benefits to become effective. For this reason I regret that we cannot allow you to present your claim for disability at this time.

Policy No. 1191014 was issued October 14th, 1925, the premium being paid in cash to October 14th, 1926. You gave a note for the 1926-1927 premium which note became due February 14th, 1927. You failed to meet this note when it became due and surrendered the policy on March 8, 1927. In the case of this policy had you applied for disability and waiver of premium benefits before October 14th, 1926, you would beyond any doubt have been entitled thereto, provided, of course, that the proofs submitted by you were satisfactory, but here again the terms of the contract provide that the due proof of disability must be furnished before there has been a default

(Testimony of James McCulloch, Jr.)
in the payment of any premium or before the policy has been surrendered and I am afraid that we have no choice other than to hold you to the terms of the contract.

I am enclosing copies of the policies made up from our records so that you may see for yourself the terms of the contracts to which I have referred. I hope you will appreciate that, in cases such as this, a mutual life insurance company has no choice whatever as to whether or not, in certain deserving cases, exception shall be made and the terms of the policy contracts overlooked. Your case is but one of many in which consideration for other members demands that we adhere strictly to the provisions of the policies though the equities may seem to point to a more lenient course of action.

Regretting that I cannot make a more favorable report to you concerning the status of your policies, I am,

Yours very truly,

Robert Deckert,

Vice President and Counsel."

After the receipt of that letter I took the case up with my attorney. I brought suit. (Record shows that note was paid after suit brought). On the various transactions of the issuances of the policies and the giving of the notes, I dealt with Mr. Carrell. He originally wrote or solicited the policies. I did not have copies of the policies from the time I discovered, or was informed, that I was suffering from tuberculosis. Not until Mr. Carrell gave me the copies in March 1929. At the time I was taken sick I was X-rayed by Dr. Kinney, in August, 1926. After I found out what my trouble was I made

(Testimony of James McCulloch, Jr.)
investigation to learn whether at that time my case was diagnosed as tuberculosis. I went and found out what the first report of the picture was. That was the first I knew that was the nature of my trouble. I knew at the time of this conversation in 1929 when I had the policy in my possession that they were in force at the time and I could have filed a claim. At the time I surrendered the policies I believed there was due and owing the second year's premium.

I was taken down in July 1926 and was confined to my bed to about the middle of September. I was unable to leave the place until some time about the first part of November. After that I could get out and around a little bit and was again taken down in April. I was in bed at that time about three months. I had numerous setbacks since then, I cannot remember the dates, also last fall. I have had to take rest periods every day, and was again confined to my bed this fall, for five days. I am not able at this time to do any work.

CROSS EXAMINATION OF WITNESS BY MR. GIRLING.

I was operating the hospital, taking care of the place. I am not a physician or surgeon; I was manager of the hospital. I had employees at the hospital, bookkeeper, nurses and the usual employees found at a hospital. I took over the hospital in 1922, in the early part of the year. My duties were management of the hospital and assisting in carrying the patients. I would usually start the day's work about eight or nine o'clock, sometimes leave at noon and then back again in the afternoon and stay until around seven or eight, or nine o'clock in the

(Testimony of James McCulloch, Jr.)
evening, sometimes stay half the night. I devoted practically all of my time to the hospital. Did not do outside work. I worked at Rockwell Field for the United States Government in 1919 and 1921. That was the last time I worked for the Government. I was an aviation mechanician. I am not medically trained.

Policy A, #1191014 for $10,000 was taken out in October 1925, with the defendant Company. At that time I executed a note for the premium. The note, Plaintiff's Exhibit 1, for $275.60 is the amount of the premium upon Policy A. The note was for a period of four months, to January 29th. I received the policy in the meantime. I kept the policy in a file in the hospital along with other private papers. The note was not paid on January 29th. Nothing was done towards paying it at that time, it was just carried along. I paid the note at a later time. I paid $150.00 at one time and the balance in September 1926. I think I paid the $150.00 in cash, I haven't got that check. The balance I paid in September 1926. Plaintiff's Exhibit 4 is the check, balance due on the note at that time. That paid the premium for the first year. For the second year's premium on Policy A, I executed a note at the time I gave the check. I executed the note in November on that policy. The note is there, Plaintiff's Exhibit 6 for $275.60, dated November 14, 1926. When the note I gave on September 29th, 1925 on Policy A fell due, I later paid it in two installments. The first installment, I think, in December, and paid the balance in September. Policy A insures me from the 14th of October 1925 for a year. The last note is dated November 14th, 1926. According to that I took the grace period. The

(Testimony of James McCulloch, Jr.)
policy carries a period of thirty days grace. I gave the note on the last day of grace. The second note was due by its terms on February 14th, 1927. The note was never paid. The next policies I took from the defendant Company were policies referred to as B and C. Policy B is for $15,000 and Policy C is for $5,000. These policies were written about November 27th, 1925. I got them both at the same time. I gave a note for the first annual premium. Plaintiff's Exhibit 5 is the note payable to the Penn Mutual Life Insurance Company, dated November 25, 1925. The note was due in March 1926, upon policies B and C. All of the notes are payable to the Penn Mutual Life Insurance Company. In giving them it was my intention to pay the premiums on the various insurance policies. The receipt, Plaintiff's Exhibit 2 is for the annual premium on Policy A. It hasn't anything to do with the other policies. The note given in November for $551.20 was never paid. It was paid in part with the note I gave Don Carrell. I gave the note to Don Carrell because he demanded the note. He said he paid the note to the Penn Mutual Life Insurance Company and wanted to be reimbursed. I understood he paid the Company out of his own pocket. I gave him the note for $339.39, Plaintiff's Exhibit 8. That note paid in part Plaintiff's Exhibit 5. The note for the $339.39 is dated the fourth month, 19th day. April 19th. I did not have a settlement on the policies prior to that time. I surrendered the policies to him the day I gave the note. When this happened on April 19th, 1927, Carrell received the note from me, Plaintiff's Exhibit 8. I am pretty sure it was the date I surrendered the policies. He demanded

(Testimony of James McCulloch, Jr.)

that I surrender the policies A, B, C. He told me I had insurance paid up to that time and that cancelled it out. Check, Plaintiff's Exhibit 7 is for $300.00, given on February 10th, 1927. It bears date February 24th 1927; it was post dated. On February 10th, I made the appointment with Randolph and Son. I had the conversation with Mr. Carrell about the post dated check. I gave the check, Plaintiff's Exhibit 7 to pay on the note, the five hundred odd dollars note. When this check was not good I issued the other note, Exhibit 8. I am not sure the $399.00 note took up the check, because the check refers to the note itself. The check was paid back to me after I gave him the note. It was my intention to take back the check, not pay both of them. I was engaged in work at the hospital in July 1926 when I first took down with an illness. Dr. Tanner took care of me. With the first illness I was confined in bed to about the middle of September. I went to bed on July 31st and stayed in bed until about the middle of September. I was at home. Dr. Tanner took care of me for that period of time. Dr. Alberty was called in, called in consultation. Dr. Alberty saw me just one time. It was in August. Dr. Tanner pronounced the ailment as pneumonia. Dr. Alberty never told me what he pronounced it. I did not go back to the hospital until some time in November. I was not around the hospital from July until about November. I was at home during that period, lounging around the place after I got out of bed. Dr. Tanner saw me. He took care of me continually then. I went to the hospital once in a while after November. Maybe once or twice in November. I went to the hospital in December. I cannot tell

(Testimony of Chester O. Tanner)

how many times, approximately eight or ten times. I went there in January, I could not tell exactly how many times, approximately eight or ten times—about five or six times. To the best of my recollection it was five or six times. I went to the hospital a few times in February. It might have been four or five times, or a half a dozen times, maybe a little more. In March 1927, I was under a good deal of pressure at that time. I went down to the hospital about a dozen times. It was on March 31st when the bankruptcy occurred and a receiver was appointed and the hospital taken over. March 31st, 1927. I was at home the rest of my time, lounging around and in bed. From July 1926 until March 1927, Dr. Kinney also saw me. He took X-rays of me. I did not have a conversation with Dr. Kinney about my ailment when he took the pictures. It was over a year after he took the pictures. During the period from July 1926 to March 1927 I was weak and sick, and was at home except for the few times I went to the hospital. I applied to the Veteran's Bureau for treatment on July 6, 1927. I do not recollect signing any papers when I surrendered the policies.

CHESTER O. TANNER,

called as a witness for plaintiff testified as follows:

I am a physician and surgeon, licensed to practice in California. (qualifications stipulated)

I had occasion to treat Mr. McCulloch professionally in the summer of 1926. The treatment commenced on August 1st, 1926. He was at home at that time. I made an examination of him to determine his condition. I

(Testimony of Chester O. Tanner)

treated him until about the middle of October 1926, continuously. I made about thirty-five or forty visits during that period. At that time Mr. McCulloch was suffering from tuberculosis. He had tubercular pneumonia. I did not diagnose that upon the first visit. About three weeks after I first visited Mr. McCulloch I determined he was suffering from tuberculosis. At that time I called Dr. Alberty and Dr. Kinney in consultation. I think I told Mr. McCulloch he had pneumonia, but didn't tell him he had tubercular pneumonia. That was from July 1926 to November 1926. I never treated Mr. McCulloch after November 1926. From August 1926 to November 1926 the degree of disability of Mr. McCulloch was total. My prognosis of his condition at the time I stopped treating him in November was very bad. From my observation of him the last time I saw him I thought the condition of his disability would be permanent. I haven't gone over his chest for some time. I have not examined his chest since November 1926. Dr. Kinney delivered to me certain X-Ray plates.

(X-Ray plates offered in evidence by plaintiff and received in evidence.) I have examined the plates. They showed tuberculosis throughout both lungs with fluid at the base of the right lung. I don't think I ever told Mr. McCulloch he was suffering from tuberculosis.

CROSS EXAMINATION OF DR. TANNER BY MR. KUNZEL.

I saw Mr. McCulloch practically every day during August 1926, and about twice a week during the month of September. I saw him practically every day at his home.

(Testimony of Dr. W. M. Alberty)

I didn't see him every day but he was in my care all of that time. I think he got up and went to the hospital two or three times without my permission. I have a record of the visits, but not a detailed record every day. I examined the X-Rays. The nature of the findings were an old chronic tuberculosis throughout both lungs with fluid at the base of the right lung. That tubercular condition was scattered throughout both lung fields. I think the last time I saw Mr. McCulloch was October 15, 1926, until the Veteran's Bureau. I saw him twice when I helped him through the Veteran's Bureau. I think that was early in 1928. I saw him the first day of August and then I saw him almost continually until about October 15th, 1926.

DR. W. M. ALBERTY

called as a witness on behalf of plaintiff, testified as follows:

I am a physician and surgeon and admitted to practice in the State of California. (Qualifications stipulated.) I took my medical education at Kansas University. Have been practicing in California since 1920. I have not specialized in any particular line. I was called in by Dr. Tanner in connection with the treatment of Mr. McCulloch. That was on August 17, 1926. Mr. McCulloch was at his home at that time, in San Diego. We made a diagnosis of Mr. McCulloch's condition then. At the time I saw him he was ill with pneumonia. History of having been ill for two weeks with onset of rather sudden, and history of pneumonia, the findings of pneumonia and fluid at the time I saw him. He had findings

(Testimony of Dr. W. M. Alberty)

in his chest, lung findings in addition to the fluid that caused us to suspect strongly a tubercular pneumonia of a tubercular origin. Subsequently Dr. Kinney was called in to make X-ray pictures. After that I got the pictures and formed our physical findings. The diagnosis of the combination of physical findings and X-ray was plural effusions with fluid in his chest, which we thought probably tubercular. I could say no more definite. I did not continue to treat Mr. McCulloch for a long period of time. That was the only time I saw him, the one time. Mr. McCulloch consulted me again in regard to his illness in January 1929. I made a further examination of him at that time. At that time he had the findings that I considered tubercular. I requested further X-ray study and this was made in February 1929. The combination of the physical findings and the X-ray showed that his chest had healed considerably from the X-ray standpoint, but was not entirely healed. It showed evidence of unhealed lesions. Upon the first occasion of visiting him in 1926, in my opinion, the condition as to his disability was total at that time. His condition was such that it was likely to continue. I could not say whether it would be permanent. Combining it with my examination of him in 1929, I would say the lesions would probably eventually heal, but it would take considerable time. From the condition of his chest in 1929, I thought at that time it would take a year, that is, he could not expect to do duty for at least a year. Between 1926 and 1929 in my opinion, I did not believe he was able to do any work of any kind. This is my opinion as a physician. In the treatment of his condition he refrained from doing any work. I have

(Testimony of Dr. W. M. Alberty)

examined Mr. McCulloch rather frequently since 1929. I saw him within the last month. At the time I last saw him he was progressing. I can find no evidence at present of activity, that is, moisture in the chest. I do not believe he should be doing any physical labor. He should not be doing any labor of any kind. The treatment that is given to him is principally rest. He has been under observation rather frequently. During 1930 he has had two or three respiratory things secondary in nature that required him to be in bed. No definite line of medical treatment but observation and rest and forced feeding as much as possible. Nothing different from the ordinary treatment of cases of this character. At the time I saw Mr. McCulloch about a month ago, in my opinion he is totally disabled at present. I do not believe he should go back to work, where he is exciting himself strenuously. I do not believe there is any kind of constant effort he could put forth at the present without detriment to his physical condition. I am hopeful of a change in that condition sometime in the future. In August and in May 1930 he had a flare up that required strapping, at which time he ran a temperature. X-ray checking at that time showed some softening of his lung tissue, and although his chest findings now show very little, it would not be policy for him to go back this early after that had occurred. I did not tell Mr. McCulloch what he was suffering from, to my knowledge, before 1929. That was the

(Testimony of Dr. W. M. Alberty)

first time I ever informed him of what the diagnosis was as to his condition in 1929. I don't believe I told him anything about his diagnosis when I first saw him in 1926. I was at that time called into consultation by Dr. Tanner.

CROSS EXAMINATION OF DR. ALBERTY BY MR. KUNZEL.

I haven't any of the X-rays with me that were taken in 1929 and 1930. I saw him only once, in 1926, in August. I couldn't say definitely how old a lesion he had. The X-ray examination revealed lesions, but we considered healed lesions. I did not make at that time any clinical test more than a physical examination. No sputum tests were made to my knowledge. The clinical examination revealed what we thought was a tubercular condition. I am not qualified to read the plates and interpret them. My physical findings were made upon those and the X-ray findings which were interpreted by an X-ray man and we drew out conclusions. I took the interpretation of Dr. Kinney, the X-ray man. He had old lesions, according to the X-ray report in both lungs. His acute findings were in the right. He had findings in the apex, of old lesions. He had moisture in the right upper lobe. I made those notes of Mr. McCulloch at that time. I find no moisture at this time. The last time I checked his chest he had old lesions still, healed lesions. I doubt if it would be advisable for Mr. McCulloch at this time to do clerical work. I would not want to say that he could do outside work until he was further checked with X-ray study again. The last X-ray study was made in August, 1930, August 25th, 1930. I haven't had any since then.

(Testimony of James McCulloch, Jr.)

JAMES McCULLOCH, JR.,

PLAINTIFF, RECALLED FOR FURTHER CROSS EXAMINATION

BY MR. GIRLING.

At the time I gave the $339.39 note to Mr. Carrell, Plaintiff's Exhibit 8, there was a conversation with Mr. Carrell, and I surrendered the policies. As far as I can recollect that was the only time I signed anything regarding the giving up of these policies. I am not sure, but I think it was upon April 19, 1927, somewhere along in there. That is my signature to the paper shown me marked, "Note Policy Surrender", bearing date of March 18, 1927. I have no recollection when I signed this. I did not receive the insurance policy, No. 1191014, Policy No. A which is mentioned as being returned to me on that day in this instrument, when I signed this paper. I believe I had the policy at that time. I might have delivered the policy over to the Company when I signed that. I got the promissory note from Mr. Carrell later. I got that on March 3, 1929 when I went to his office. He also gave me the policy at that time. That is how I came to have it in my possession, he gave it to me. They had it in their possession up to that time. From the time I surrendered it. I got the policy when it was first issued by the Company. I got it back in 1927. I believe it was when I signed this. When I talked with Mr. Carrell a couple of years later he still had the policy and the note and he let me have it back. I believe I surrendered the policy to the Company at the time I signed this. (Photo-

(Testimony of James McCulloch, Jr.)
static copy of instrument offered and received in evidence, marked Defendant's Exhibit A.)

The policy surrender was given up by me and signed on March 18th, and the note to Mr. Carrell was executed on April 19th. That is my signature to the instrument printed "Note Policy Surrender" relating to Policy #1196774, Policy No. B, signed as of December 30th, 1926. As far as I can recall that is the date on which it was signed. That is my signature to another "Note Policy Surrender" relating to Policy #1196773, Policy C, dated December 30, 1926.

(Photostatic copies of instruments offered and received in evidence marked Defendant's Exhibit B, Policy No. 1196774, and defendant's Exhibit C, Policy #1196773.)

I believe I delivered up the policy of insurance referred to in each of these Exhibits when I signed them in December 1926. I was carrying other life insurance policies. I was still a pretty sick man during all this time. That is my signature to the instrument headed at the top "Penn Mutual Life Insurance Company", dated at San Diego, February 14, 1927. (The three Note Policy Surrenders read into the record.)

Defendant's Exhibit A is as follows:

"To be used when the right to change beneficiary is reserved in the policy"

Note Policy Surrender.

"First changing the policy and making it payable to me or to my executors, administrators or assigns, I, the undersigned, for value received, for myself, and as Attorney in Fact for all beneficiaries under the policy, do hereby

(Testimony of James McCulloch, Jr.)

surrender, assign, transfer and set over, all right, title and interest whatsoever of, in, and to policy No. 1191014 on the life of James McCulloch, Jr., in the Penn Mutual Life Insurance Company of Philadelphia, unto the said Company, its successors or assigns, in consideration of receiving from said Company my note for $275.60, dated the 14th day of November, 1926, given in settlement of annual Oct. Premium on said policy, due the 14th day of October, 1926, this day cancelled and returned to me, and I hereby release the said Company from any liability by reason of the acceptance of the said note.

Witness my hand and seal at San Diego, Cal., this 18th day of March 1927.

Witness present: Don C. Carrell.

Signed James McCulloch, Jr.,"

Defendant's Exhibit B is as follows:

"To be used when the right to change beneficiary is reserved in the policy.

Note Policy Surrender.

"First changing the policy and making it payable to me or to my Executors, Administrators or Assigns, I, the undersigned, for value received, for myself and as Attorney in Fact for all beneficiaries under the policy, do hereby surrender, assign, transfer and set over, all right, title and interest whatsoever of, in and to Policy No. 1196774, on the life of James McCulloch, Jr., in the Penn Mutual Life Insurance Company of Philadelphia, unto the said Company, its Successors or Assigns, in consideration of receiving from said Company my premium note for $413.40, dated the 25th day of November, 1925, given in

(Testimony of James McCulloch, Jr.)

settlement of annual premium on said policy, due the 27th day of November, 1925, this day cancelled and returned to me, and I hereby release the said Company from any liability by reason of the acceptance of the said note.

Witness my hand and seal at San Diego, Cal., this 30th day of December, 1926.

Witness present: Ada M. Kelley.

(Signed) James McCulloch, Jr."

Mrs. Kelley is bookkeeper and accountant in Mr. Randolph's office, and is the agent here of the Penn Mutual Life Insurance Co.

Defendant's Exhibit C is as follows:

"To be used when the right to change beneficiary is reserved in the policy.

Note Policy surrender.

First changing the policy and making it payable to me or to my Executors, Administrators or Assigns, I, the undersigned, for value received, for myself and as Attorney in Fact for all beneficiaries under the policy, do hereby surrender, assign, transfer and set over, all right, title and interest whatsoever of, in and to policy No. 1196773 on the life of James McCulloch, Jr., in the Penn Mutual Life Insurance Company of Philadelphia, unto the said Company, its successors or assigns, in consideration of receiving from said Company my premium note for $122.50, dated the 25th day of Nov. 1925, given in settlement of annual premium on said policy, due the 27th day of Nov. 1925, this day cancelled and returned to me, and I hereby release the said Company from any liability by reason of the acceptance of the said note.

Witness: Ada M. Kelley.

Signed, James McCulloch, Jr."

(Testimony of James McCulloch, Jr.)

It is my signature on the instrument dated February 14th, 1927. (Instrument dated February 14th, 1927, offered and received in evidence, marked Defendant's Exhibit D.) (It is stipulated that the policies were not reinstated.)

At the time I offered the application for reinstatement, I tendered that $300.00 check. My understanding was it was to be applied to the note. I believe I also gave Mr. Carrell a new note at the time for $530.00. That was about February 14th, 1927. That is when I gave the check for $300.00. I received the check back at the time I gave Mr. Carrell that note. The $339.00 note. On the application for reinstatement down to the words "Certificate of health from the Medical Examiner" everything above that is written in pen and ink is in my handwriting. It appears there that I said "Yes" to question No. 3 stated therein "Are you in good health?" I was led to believe I was getting better. I couldn't say I was in good health, I don't know, in fact, I know I wasn't. I know that now. I did not know it then. I had only been able to go to my hospital about five times that month. I was weak. I figured it was just naturally the effect of the sickness that I had been through. I had been in bed from the last of July to the middle of September. I wasn't in bed in November. The next time I was in bed was in April. Between that time up to the time I presented this instrument, I had been to the hospital about four or six or eight times in any one month. It might not have been as often as that. "Q You thought you were in good health? A It might not have been as often as that. Q You thought you were in good health? A Well, I was rest-

(Testimony of James McCulloch, Jr.)

ing up and recovering from my sickness. Q That does not answer my question. You thought you were in good health, Mr. McCulloch? A I thought I was fairly. I was under that impression."

Defendant's Exhibit D read into the record and is as follows:

"The Penn Mutual Life Insurance Company, Philadelphia, Pa.

Upper portion of health certificate, including agent's statement is required.

For conversion of Optional Term Policies within thirty-one days after the time limit for the conversion of such policies has expired.

For adding double indemnity within five years of date of issue.

Full health certificate is required:

(a) For revival of policies when the premium is delinquent more than sixty days from premium date. Insured to pay fee.

(b) For additional insurance sixty days after and within six months of date of last examination. If the total amount is over $30,000, a specimen of urine to the home office. For a total amount in this Company exceeding $50,000 see "Requirements for Single and Double Examinations and Microscopics" Fee to be paid by Company.

(c) For conversion of Optional Term Policies after thirty one days after the time limit of conversion for such policies has expired. Fee to be paid by the Company.

(d) For adding Waiver of Premium, Disability Annuity after sixty days from date of last examination. Insured to pay fee.

(Testimony of James McCulloch, Jr.)

(e) For adding double indemnity, five or more years after date of issue. Insured to pay fee.

(f) For putting new policy in force after sixty days and within six months from date of original examination.

(g) For change of plan from a higher to a lower premium form after sixty days from date of last examination. Insured to pay fee.

(h) For purchasing additional paid up insurance of not more than $1,000. Insured to pay fee.

I hereby request and certify that the answers to the following questions and the statements and answers contained in part 11, statements to Medical Examiner, dated ....shall be considered as a part of and an amendment to my application for Policy No. 1196773-4 in your Company, made the 24th day of Nov. 1925.

1. For what purpose is this certificate furnished?
   Then in filling in the blank for reinstatement.

2. Has there been any change in your family record since the above date? Give details? No.

3. Are you in good health? Yes.

4. Have you lost a foot or a hand? No.

5. Have you had any sickness or injury since the above date? Give full details. Yes.

6. Have you any defect in hearing? No.

7. Have you any impairment of sight in either eye? If so, is the vision in other eye normal? State full particulars. No.

8. Has there been any change in your use of intoxicating liquors or drugs since the above date? No.

9. a. Have you, since the date of your application, applied to any company or agent for insurance without

(Testimony of James McCulloch, Jr.)
receiving a policy of the exact kind and amount applied for? No.

b. Are any negotiations for insurance now pending or contemplated? (If so, state full particulars, including amount of disability benefits.) No.

10. What is your present residence address? (give street and number) 4275 Ingleside Ave.

11. a. Have you ever taken an aeroplane flight? (Give details, if so, how many flights in each of last three years?) No answer.

b. Do you contemplate doing so?

No answer.

12. What is your principal occupation? Supt. Hospital.

b. What is your other occupation? None.

c. Exact duties? No answer.

d. Name of employer? Self.

e. Give business address. 914 Beach St., San Diego.

13. State below the total amount of insurance on your life. Company. Amount of Life Insurance, Disability benefits per Month. Accidental Death Benefit.

Below that the words "See Record"

State what amount if any is corporation insurance? no answer.

Then below.

I hereby certify that my health is not impaired; that I have not consulted a physician during the past three years, except as stated above, and I hereby declare that my answers to the foregoing questions are full, complete and true, and are made for the purpose of inducing the Penn Mutual Life Insurance Company to comply with the re-

(Testimony of James McCulloch, Jr.)

quest as stated in answer to Question No. 1 hereof, and it is understood and agreed that no liability on the part of the Penn Mutual Life Insurance Company shall arise under this health certificate until it has been approved at the home office of the Company in the City of Philadelphia, Pennsylvania, and the premium has been paid, during my lifetime and good health. Dated at San Diego, this 14th day of Feb. 1927.

Witness present, H. S. Anderton, M. D.

Signature of applicant, signed James McCulloch, Jr.

AGENT'S STATEMENT

"I am personally acquainted with James McCulloch and believe his answers to the above questions are true.

Signature of Agent blank.

General Agent (signed) C. L. Randolph.

Then below:

CERTIFICATE OF HEALTH FROM THE MEDICAL EXAMINER.

THIS IS TO CERTIFY, that I have this day carefully examined Mr. James McCulloch of San Diego, Calif. at 2:30 P. M. above referred to with the following results:

14. Are the heart sounds normal and is the action regular? Yes. What is the pulse rate? 76.

15. Are the lungs free from abnormalities? Yes.

16. Height 5 ft. 8½ in. Weight 130 lbs. Chest expanded 33 in. Abdomen 29.

17. What is the blood pressure? Sys. 122. Dias 80.

18. Urine. A. Specific gravity 1014 B. Albumin Neg. C. Sugar Neg. D. Was the urine passed in your presence? Yes.

(Testimony of James McCulloch, Jr.)

19. Examination of woman is left blank.

20. Has any near relative, uncles, aunts and grand parents included, had tuberculosis (consumption), insanity, apoplexy or Bright's disease? Explain fully. No.

21. Does his occupation expose him to any hazard from poison, dust, abnormalities of temperature, dampness, infection or accident? If so, explain fully on back. No.

Then the remarks.

Dated at San Diego, Calif. this 14th day of Feb. 1927. Signature of Examiner (Signed) H. S. Anderton, M. D."

Under the lower right hand side:

"Lobar pneumonia, July 1926—2 mo. disability, complete recovery. No complications. Dr. C. O. Tanner, 1st. Nat'l. Bank Bldg., San Diego, Calif.

I had other insurance and I made application for disability under it. In the Metropolitan Company.

I believe I signed the instrument dated June 13th, 1927 headed at the top "Metropolitan Life Insurance Company".

(Photostatic copies of the instrument offered and received in evidence, marked Defendant's Exhibit E) and is as follows:

"METROPOLITAN LIFE INSURANCE COMPANY.

Claim Division—Disability Section. Form 0343. May 1926.

APPLICATION FOR TOTAL AND PERMANENT DISABILITY BENEFITS.

STATEMENT OF CLAIMANT.

This statement must be completed by the insured. If the insured is mentally incompetent, the statement should

(Testimony of James McCulloch, Jr.)

be completed by the Guardian or Committee, or if none has been appointed, then by the beneficiary named in the policy.

1. Full name of insured. James McCulloch, Jr.,

2. Present *resident.* No. 4275 Street, Ingleside Ave., City, San Diego, State, Calif.

3. State number of policy under which claim is made. #1157497A.

(a) If insured under any other policies issued by this company state the numbers. #1739486-A

4. Date of birth. Dec. 6, 1893.

5. Give the date of injury or beginning of illness causing present condition—about April 10, 1927.

6. Give name of illness or cause of injury and describe fully present condition. Influenza with fluid.

7. Name and address of last employer? Self.

8. State exact duties of occupation. Hospital superintendent.

9. Date quit work. No answer.
Give the reason. No answer.

10. Has any work been performed since commencement of present affliction? No.

11. When is it expected that work may be resumed? Three to six months.

12. Give names of all physicians who have attended and dates of such attendance.

NAME	ADDRESS	DATE
T. Maud Ramer, M. D.	526 Electric Bldg.	From 4/9/27 to 4/9/27
E. Blanch Ramer, M. D.	526 Electric Bldg.,	From 4/9/27 to 6/13/27
J. A. Parks, M. D.,	Electric Bldg.	consultation 5/15/27 and 5/17/27.

(Testimony of James McCulloch, Jr.)

13. State if sick benefit, allowance, or pension is received, from any other source. No. If so, give name of Company or Association. Left blank.

Sworn to before me this 13th day of June, 1927. Wilhelmine Schaffiet, Notary Public.

Signature of insured, James McCulloch, Jr.

Residence, No. and Street, 4275 Ingleside.

City, San Diego, Calif.

I had T. Maud Ramer, physician, 526 Electric Bldg., of San Diego, prepare a statement for it on June 13, 1927. I saw that statement. This is the statement (showing statement to witness). That is part of the application to the Metropolitan, that is the one that was rejected.

(Photostatic copy of statement read into record.)

METROPOLITAN LIFE INSURANCE COMPANY —Claim Division—Disability Section, Form 0345.

APPLICATION FOR TOTAL AND PERMANENT DISABILITY BENEFITS STATEMENT OF ATTENDING PHYSICIAN.

1. Full name of insured. James McCulloch, Jr. Age 34.

2. Residence, 4275 Ingleside Avenue.

3. State cause of injury or infirmity or name the disease or illness. Influenza with *Pluresy* and Effusions.

4. On or about what date were you first consulted? April 9, If insane, give date of commit*t*ment. No answer.

5. Are you attending at the present time? Yes. If not, give date of your last attendance. No answer.

6. How long was patient confined to the house? Confined to bed at present.

(Testimony of James McCulloch, Jr.)

7. If not confined to the house, state whether able to perform work of any kind.

8. Give diagnosis and symptoms in detail. Severe case of influenza accompanied marked prostation—which is spelled p r o s t a t i o n. Temp. 106 deg. Rapid respiration d*y*p*n*ea—dullness over left lung up to and above 7th rib—fluid on aspiration.

9. When did patient first show the symptoms of present illness? 5 days—3 weeks previous.

10. Describe in detail the exact condition at the present time. Convales*si*ng slowly. Marked loss of weight—rapid—di*a*lated heart, temperature every afternoon.

11. What is the prognosis? Guarded.

12. Is patient totally disabled at the present time and wholly unable to perform any work or engage in any business? Yes.

13. How long has the patient been continuously and totally disabled? April 6th.

14. If totally disabled at the present time, will such total disability be permanent? No.

15. If the total disability will not be permanent, when may work be resumed? 3 to 6 months.

Physicians are requested to give full information. If desired, additional comments may be made on the reverse hereof under "REMARKS".

Sworn to before me this 13th day of June, 1927.

Wilhelmine Schaeffiet, Notary Public

Signature of physician, T. Maud Ramer.

Residence No. and Street, 526 Electric Bldg., City of San Diego, State of California.

This statement must be sworn to before an officer duly authorized to administer oaths, and seal impressed hereon.

(Testimony of James McCulloch, Jr.)

Claimants are bound to produce at their own expense such medical testimony as may be required by the Company."

Exhibit (Defendant's F,) dated June 13th, 1927. Exhibit E refer to both policies. Number of policies under which claim is made 1157497A & 1739486-A.

The next referred to as Exhibit G, and is as follows:

"METROPOLITAN LIFE INSURANCE COMPANY, CLAIM Division—Disability Section. APPLICATION FOR TOTAL AND PERMANENT DISABILITY BENEFITS. STATEMENT OF CLAIMANT.

1. Full name of insured. James McCulloch, Jr.

2. Present residence. 4275 Street, Ingleside Ave., City, San Diego, State, California.

3. State number of policy under which claim is made. 1157497A and 1739486A.

(a) If insured under any other policy issued by this Company, state the numbers. None.

4. Date of birth. December 6, 1893.

5. Give the date of injury or beginning of illness causing present condition. Confined to bed April 20, 1927.

6. Give name of illness or cause of injury and describe fully present condition. Pleuresy with effusion and tuberculosis puln. (pulmonary) Feeling of weakness, tires easily, loss of weight and afternoon temperature.

(Testimony of James McCulloch, Jr.)

7. Name and address of last employers. Self.

8. State exact duties of occupation. Hospital manager.

9. Date quit work. April 3/27.

10. Give the reasons. Business reasons. Has any work been performed since commencement of present affliction? None.

11. When is it expected that work may be resumed? Do not know.

12. Give names of all physicians who have attended and dates of such attendance.

Name	Address	Dates.
E. B. Ramer, M. D.,	Electric Bldg., San Diego, Cal.	4/20/27 to 7/6/27
M. E. Ramer, M. D.,	Electric Bldg., San Diego, Cal.	4/20/27 to 7/6/27
J. A. Parks, M. D.,	Electric Bldg., San San Diego,	in consultation.
F. C. Pache, M. D.,	1233 Lincoln Ave., San Diego,	7/6/27 to date.

13. State if sick benefit, allowance, or pension is received from any other source. None.

Sworn to before me this 10th day of August, 1927.

O. E. Mark, Notary Public. Signature of insured,

James McCulloch, Jr.

Residence, No. and Street, 4275 Ingleside, City, San Diego, State, Calif.

(Defendant's Exhibit G received in evidence.)

DEFENDANT'S EXHIBIT H, offered and received in evidence, and is as follows:

(Testimony of James McCulloch, Jr.)

"METROPOLITAN LIFE INSURANCE COMPANY, Claim Division—Disability Section. Form 0345, December 1926. Printed in U. S. A.

APPLICATION FOR TOTAL AND PERMANENT DISABILITY BENEFITS. STATEMENT OF ATTENDING PHYSICIAN.

1. Full name of insured. James McCulloch, Jr., Age 34.

2. Residence, 4275 Ingleside St., San Diego, Cal.

3. State cause of injury or infirmity or name the disease or illness. (1) Tuberculosis Pulm.

Pulmonary, I take it.

Chronic active. (2) Pleur*e*sy with effusion.

4. On or about what date were you first consulted? July 6, 1927. If insane, give date of commitment.

5. On what date were you last consulted? July 15, 1927.

6. How long was patient confined to the house? Do not know as claimant first seen by me on 7/6/27.

7. If not confined, state whether able to perform work of any kind? Unable to work—Should be in hospital.

8. Give diagnosis and symptoms. (Please describe in detail.) Weakness. Tires easily. Cough and expectoration. Loss of weight. Dyspnoea. Afternoon temperature and rapid pulse. Poor appetite. Appears chronically ill. Pale color. Emaciated. Pulse 108 (seated) Temp. 37.2 degrees centigrade. Height, 67 3/4. Weight 119-1/2. Exam. of chest. Moderately long, broad and flat. Mobility impaired. Expansion unequal. Left legs markedly. Fremetus increased. Diminished resonance.

(Testimony of James McCulloch, Jr.)
Rt. 3rd rib to 5th Dorsal spine up. Dorsal left, 3 rib, 5th Dorsal 5 up. Dullness right base to 5th Dorsal spine. Dullness left base to 7th Dorsal spine. Increased voice conduction. Right 3rd rib and 5th Dorsal spine up. Medium moist rales over both. I. V. C. and R. V. B. Left 3rd rib 5th Dorsal spine up. Pleur*e*sy with effusions upper lobes absent breath sounds over left base tub. left pleura.

Diagnosis. Tuberculosis Pulm. Active.

9. When did patient first show symptoms of present illness? Do not know.

10. Describe in detail the exact condition at the present time. See 8. Patient has active pulm. tuberculosis with cavitation in upper left lobe, with *pluerésy,* fib. chr. & effusion in left pleura. 150 cc of fluid estimated. Findings confirmed by X ray.

11. What is the prognosis? Guarded.

12. Is patient totally disabled at the present time and wholly unable to perform any work or engage in any business? Yes.

13. How long has the patient been continuously and totally disabled? Cannot state definitely but would estimate at least six months from present condition.

14. If totally disabled at the present time, will such total disability be permanent? From history of case and findings, total disability will probably continue indefinitely.

15. If the total disability will not be permanent, when may work be resumed? Aug. 24, 1927. O. K.

Physicians are requested to give full information. If desired additional comments may be made on the reverse hereof under "remarks".

(Testimony of James McCulloch, Jr.)

Sworn to before me this 8th day of August 1927, John A. Hewicker, Notary Public. Signature of Physician, F. C. Pache, M. D., Residence, No. and Street, 1233 Lincoln Avenue, City, San Diego, State, Calif.

This statement must be sworn to before an officer duly authorized to administer oaths, and seal impressed hereon. Claimants are bound to produce at their own expense such medical testimony as may be required by the Company.

See later statements attached 3/22/28 and 3/28/28.

On May 15th, consultation with Dr. J. A. Parks, Chest aspirated. Diagnosis treatment confirmed, bearing no signature.

I was called down to the District Attorney's office, about the check and I had a letter. It was about this check inasmuch as it was placed there. It did not ask me to come down about anything else at that time, the letter was not about that check at that particular time. I do not have the letter or a copy of it. I received two or three from down there. I think Mr. Cornell signed the letters. I am not sure, it was so long ago. All of the letters did not relate to this check. Just one letter. I do not recall what he said, but he told me to come down there. I talked to Mr. Cornell when I went down there. It was at the District Attorney's office. We were alone. I think I went down there sometime in March. It was before I surrendered the policy. It was before the 18th of March. I believe it was. Mr. Cornell and I had a conversation. He told me he had a check here and he wanted to know what I was going to do about it. I told him I couldn't do anything, and he told me these people would press a charge against me. Mr. Randolph would

(Testimony of James McCulloch, Jr.)

press a charge against me. I told him the check was post dated and I didn't see how he could do anything about it. He said they claim it was not post dated, whoever turned the check in. Either Mr. Randolph or Mr. Carrell who brought the check up there. I couldn't state definitely who brought the check there. I do not know of my own knowledge. It was the Randolph check, so it must have been someone out of their office who brought it there. He did not mention their names. Cornell told me that Carrell claimed it was not a post dated check, but he did not tell me who brought the check there. I do not know. He told me these people would prosecute me. He didn't tell me who they were, but I could figure out who they were. He didn't tell me whether it was Bill Jones or Tom Smith. He did not mention any names at all.

(Stipulated that there were filed offer of proof of disability on behalf of plaintiff relative to a certain life insurance policy in the Acacia Mutual Life Association.)

Defendant's Exhibit I offered and received in evidence, and is as follows:

ACACIA MUTUAL LIFE ASSOCIATION. Disability proof.

STATEMENT OF OFFICER OF MEMBER'S LODGE OR OTHER MASTER MASON, WHO KNOWS MEMBER PERSONALLY.

"1. What is your name, address and occupation? 4440 St. San Diego. (I think that is 44 40th St.) Teacher.

2. The following answer relates to the claim for total and permanent disability made on behalf of Bro. James McCulloch, Jr.

(Testimony of James McCulloch, Jr.)

3. How long have you known the member? 12 years. If claim is made by another person on behalf of the member, do you know the claimant?

4. Read the statements of the claimant, the attending physician and state whether they are correct and complete according to your knowledge and belief? A. Yes.

5. (a) Please state in detail member's present condition of health and symptoms? A. Very much under weight, weak, unable to do any work.

(b) Is he now confined to his bed or house? Give particulars. A. No. Is required to take rest in bed every day.

(c) If not, when was he last confined to his bed or house? A. October 1927.

6. (a) Is the member able to do any work for compensation. A. No.

(b) If so, by whom employed and how?

(c) When was he last employed, by whom and how? A April 1927, by himself.

(d) If unable to work for compensation at present, how soon, in your opinion, do you believe he will be able to work again? A. Very uncertain.

(e) Is the member's state of health growing worse? A. Improving slightly under present conditions.

(Signed) James N. Sexton."

That is his signature.

"State of California,
County of San Diego, ss.

On this 23rd day of April, 1928, personally appeared before me, the above named James N. Sexton, to me

(Testimony of James McCulloch, Jr.)
known and made oath that the foregoing statement by him made and subscribed are true and full to the best of his knowledge and belief.

O. E. Mark,
Notary Public.

My Commission expires........... Form 452-B-1-M-11-28-25.

ACACIA MUTUAL LIFE ASSOCIATION. Disability proof.

STATEMENT OF ATTENDING PHYSICIAN IN CONNECTION WITH CLAIM FOR DISABILITY BENEFIT UNDER POLICY OF INSURANCE ISSUED BY THE ACACIA MUTUAL LIFE ASSOCIATION.

1. Name of member. James McCulloch, Jr.

2. Date and place of member's birth? December 6, 1893, Baltimore, Md.

3. Member's residence and address. A. 3768 Eagle St., San Diego, Cal.

4. Member's latest occupation. Superintendent McCulloch Hospital, San Diego.

5. What is the nature of member's present ailment or disability? (1) Pulmonary tuberculosis, active. (2) Pleuresy, Fibroid chronic.

6. What was the date when the ailment or injury causing this diability began? A. I do not know.

7. State the (1) cause, (2) extent, (3) severity, and other (4) particulars of the disability, with an account of the course of the case from the beginning.

(1) Cause cannot be definitely stated by me.

(Testimony of James McCulloch, Jr.)

(2) Extent, infiltration of fibrosis of both upper lobes. Pleurisy both bases.

(3) Severity, moderately advanced.

(4) Claimant was examined by me on July 6, 1927 and found to have active pulmonary T. B. and pleurisy with effusions, left base. Has been under observation and examination. Show definite improvement with disappearance of effusion. Clinical findings have been confirmed by X rays.

8. What is the member's present condition? Improved. Clinical examinations have shown decreasing activity in the lungs and general improvement. Has low grade activity at present.

9. What is the degree of member's present disability? Totally disabled for any work at present.

10. At what date did total disability begin? (1) Since July 6, 1927 from personal observation at date first seen, but according to history of the case, since April 9, 1927 when he was confined to his bed.

11. Is member confined to his bed or home? No. Takes regular routine bed rest during day. Three hours in the afternoon.

12. What will be the probable future course and outcome of the case? The prognosis is necessarily guarded, but judging from the improvement made since July, the outlook for arrest is favorable.

13. What are the prospects of improvement, recovery, or lessening of the disability? (1) Prospects for continued improvement are good for recovery, and lessening of the disability, the prospects are favorable.

(Testimony of James McCulloch, Jr.)

14. How long have you been in attendance on the case? Since July 6, 1927.

15. What previous illnesses, ailments, or injuries have the member had? According to statement of claimant he has had influenza and lobar pneumonia in 1926. Fracture of the radius and ulna above right wrist in 1911. Complete recovery of fracture.

16. What circumstances or previous illnesses have there been that might have had a bearing on the member's disability? Attack of influenza and pneumonia in 1926.

17. Gives names and addresses of other physicians who have been in attendance or consultation in the case? Do not know former physicians in attendance on the case. Have not seen patient in consultation with former private physicians.

(Signed) F. C. Pache, M. D.
P. O. Address: 1233 Lincoln Ave.,
San Diego, Calif.

State of California,
County of San Diego, ss.

O. E. Mark, on this 28th day of March, 1928, appeared before me, F. C. Pache, M. D. personally known to me as a practicing physician and made oath that the answers and statements above made and subscribed to by him are true and full, to the best of his knowledge and belief.

(Seal) (Signed) O. E. Mark, Notary.

My commission expires.........................

Form 452-A-1M-11-28-25."

(Testimony of James McCulloch, Jr.)

Defendant's Exhibit J.

"ACACIA MUTUAL LIFE ASSOCIATION, Home Office, Homer Bldg., 601 13th St. N. W. Washington, D. C.

"Notice and Proof of Disability Claim, under policy No. 103467 issued by the Association, on the 1st day of October 1922, insuring the life of James McCulloch, Jr., of San Diego, Calif., in the sum of $5,000.

1. Full name of member. James McCulloch, Jr.

2. Date and place of birth? Baltimore, Md., Dec. 6, 1893.

3. Occupation of member at the time policy was issued and since that date. State exact duties and date of changes, if any. Hospital Manager.

4. Give places of residence of member since date of policy. 4074 Hillcrest Dr. 4275 Ingleside Ave., and 3768 Eagle St., all in San Diego, Calif.

5. Give complete history of all sicknesses that member has had since date of policy. Was taken down the pleurisy with effusion July 31st, 1926. Was confined to bed until October 15, 1926. April 10, 1927 was taken down with pleurisy with effusions and tuberculosis pulm.

6. (a) When did member's health first begin to be affected? Not Noticeable until 7/31/26.

(b) When did member become totally disabled? April 10, 1927.

7. Is member now wholly confined to his bed? Give particulars. No. Am required to take three hours rest in bed each afternoon.

8. (a) Is member now wholly confined to his house? Give particulars. Am up and about part of each day.

(b) If not, when was member last confined to his bed or house? October 20, 1927.

(Testimony of James McCulloch, Jr.)

(c) Is member unable to pursue any gainful occupation. Unable to do any work at all.

(d) If so, in what manner?

(e) If unable to pursue any gainful occupation at present, how soon will member be able to resume business? Do not know.

(f) Is there any improvement in his state of health? Am feeling slightly improved.

9. Give every particular regarding his illness? See No. 5, pulmonary tuberculosis—active.

10. Has he ever used liquor habitually, or to excess? No.

11. What physician or physicians attended or prescribed for the member during the last two years? C. O. Tanner, M. D., W. M. Alberty, M. D., E. B. Ramer, M. D., E. M. Ramer, M. D. and F. C. Pache, M. D., under whose care I am at present, and J. C. Parks, M. D.

12. What other insurance is there on member's life? State Companies, amount of Insurance in each and date issued. Metropolitan Life Insurance Company, $1,000, 3/22/16, Metropolitan Life Insurance Company, $15,000 6/5/24/

I, the undersigned hereby declare that the foregoing answers are full, correct and true; that no material fact relative to the condition of the health of the person of James McCulloch, Jr., insured under policy No. 103467, issued by the Acacia Mutual Life Association has been withheld. If this claim is not made by the member himself, state here why and in what capacity you have made the claim.

(Signed) James McCulloch, Jr.,
Signature of claimant.

(Testimony of James McCulloch, Jr.)

State of California,
County of San Diego, ss.

On the 28th day of March, 1928, personally appeared before me, James McCulloch, Jr., to me known to be the person whose signature is attached to the foregoing proof of claim and made oath that the statements contained herein are true and complete to the best of his knowledge and belief.

(Signed) O. E. Mark,
Seal. Notary Public.
My commission expires........................"

I filled in this blank myself. They were filled out by me and the doctor at the same time and sent in together. He got the information from his own examination and from information that I gave him. The policy of the Acacia was taken out in 1922. The Metropolitan policies were taken out in March 1916 and I think in 1924. The Acacia policy and the Metropolitan policies were taken out before I took out the policies with the Penn Mutual Life Insurance Co.

I do not have the letter or letters which I received from the District Attorney's office. I am not sure whether the letter you show me, dated March 7th, 1927 is the letter I received. I am not sure that the copy of letter dated March 16th, 1927 is the letter I received. I received three or four letters from the District Attorneys Office which occasioned my going there. I went there two or three times. The first call I made was in reference to this check. I made other calls after that but not relating to that check.

(Testimony of James McCulloch, Jr.)

REDIRECT EXAMINATION

BY MR. MONROE

On the occasions that I made the trips to the hospital I would sit in the office just an hour or so. I was not able to stay all day. I was not able to do any work at those times. The first application that I made to the Metropolitan Life Insurance Co., they rejected the claim they disallowed it as total disability claim, they allowed the second one, the Acacia claim was allowed. The second application is signed by Dr. Pache, July the 6th was the first contact I had with Dr. Pache. I went there the day I made application for hospitalization from the veterans hospital. Dr. Pache examined me for both purposes. I first learned that I was suffering from tuberculosis when he told me at that time. After he told me that I went to Dr. Kinney's office and asked him what the first X Rays showed. I think that was in October, 1927.

RECROSS EXAMINATION

BY MR. GIRLING.

I had the Acacia policies and the Metropolitan policies longer than I had the Penn Mutual Life Insurance policies. I filed claims for disability under both Acacia and Metropolitan. I had the Acacia policy since October 1922. That was for $5,000. I took out the two Metropolitan policies, one of them in New York City in 1916, they were for $1,000 and $15,000. I filed proof for disability and claims for disability under both policies. I did not file with the Acacia and the Metropolitan claiming disability from 1926. I did claim disability from the Metropolitan in 1926 (1927). At the time I filed these claims in the Metropoltan and the Acacia I did not have the Penn Mutual policies. It was after they had been taken up.

(Testimony of Anna R. McCulloch)

ANNA R. McCULLOCH,

a witness on behalf of plaintiff, testified as follows:

DIRECT EXAMINATION
OF ANNA R. McCULLOCH

BY MR. MONROE.

I am the wife of plaintiff. I was his wife in 1925. He was taken sick July 31, 1926. He had a temperature of about 104 and had a terrific chill before he came home and I put him to bed. The doctor came in and examined his throat. He felt he had a throat infection which he did have. The doctor prescribed for him and his temperature came down. He felt better in a day or two and he insisted on getting up and going down to his place of business, the McCulloch Hospital. He came home that evening and he had another terrible chill and rising temperature, it went to 106. We called a doctor again and he told him he must stay in bed, which he did. He was in bed from about August 3rd, until way on in September. He might sit up for half an hour. He was in a state of absolute prostration. He lost weight until there was nothing much to him but skin and bone. He had terrific night sweats, so the linens had to be changed three or four times a night. His underclothing was changed about six times. He could hardly turn over. I learned he was suffering from tuberculosis, but I did not tell him. He was not told during that time that he had tuberculosis. After he got up in September he would tire easily and had a rapid pulse. Pulse around 100. It would run 120 or 130 on any slight exertion. Going up a flight of steps he would have to sit down. He was next taken to bed

(Testimony of Anna R. McCulloch)

in April 1927. He went to the hospital some during these periods of time. He did not go very often, but he did go. On those occasions he was usually home before noon. At that time I did not know anything about these insurance policies. During that time Mr. Carrell was coming to the house and getting in touch with Mr. McCulloch, but I did not seem to know what it was about, and because he was recovering from this sickness I did not harass him by asking questions. When he was taken sick in April 1927, he stayed in bed about a month. Then he began to get up for forenoons and go back in the after noons for probably another month*s*. Since that time he was subject to colds and he would often stay in bed for a day or two, and on two or three occasions he would be in bed for a week or ten days. He was last confined to bed about a couple of months ago. He was in bed six or seven days. During all that period of time he was not conducting business nor has he done any work. Since he got up from the attack in April 1927 he tires easily, he cannot walk fast and would get a rapid pulse if he would climb stairs or go up grade. His appetite is not good. If he exerted himself his pulse would be quick and it would make him stop. A kind of pallor would come over him. He still takes rest periods during the day during the last few months.

CROSS EXAMINATION

BY MR. GIRLING.

Mr. McCulloch and I were not married when he worked for the Government. I recall when he filed application for hospitalization with the Veterans' Bureau. (It is stipulated it was the time the second application was made

to the Metropolitan.) It was following the attack of April of that year. I never saw the life insurance policies that are involved in this law suit. He kept them in his private papers, I believe. I was not with him when he surrendered them to the Company.

REDIRECT

BY MR. MONROE.

Mr. McCulloch learned that he had tuberculosis in July 1927. I knew of him receiving that information. As far as I know no one informed him prior to that time. I am sure they did not.

DEPOSITION OF DR. LYLE C. KINNEY OFFERED IN EVIDENCE BY MR. MONROE.

I am a physician and surgeon. I am a graduate of the University of Pennsylvania in 1908, and have practiced medicine since 1915 in San Diego, specializing since 1915 in X-Ray. I am acquainted with James McCulloch, Jr. I think I first had contact with him before the war. I have no way to date that. I have taken repeated films of his chest in the past four years. The first films I have a record of are August 18, 1926. He was in bed at that time and Dr. Tanner sent us out to take films of his chest. The films which I have here are the films which I took at that time. I did not make a physical examination and diagnosis of Mr. McCulloch at the time I took the films. I made an examination and diagnosis from the films which I took. The diagnosis was that he had fibroid tuberculosis at both apices, also fluid at the base of the right chest. From that examination I could tell the tuberculosis had lasted for some time, either months or years.

(Deposition of Dr. Lyle C. Kinney)

The fluid being a question of days or weeks. I have taken pictures of Mr. McCulloch since. The last two were taken in 1930, but we had two or three other examinations in the interval. There was change in his condition. The fluid disappeared but the tuberculosis in both upper lobes has persisted. For two years following August 1926 he had from an X-Ray standpoint definite active tuberculosis in both upper lobes and of sufficient severity to warrant his being under active treatment all that time. I would say he is totally disabled with tuberculosis.

CROSS EXAMINATION

BY MR. KUNZEL.

I took the first two films on August 18th, 1926. The findings were reported to Dr. Alberty. He was consulting with Dr. Tanner. I don't know that I conveyed my findings to James McCulloch. I would say that I did not because the usual procedure is to make a report to the doctor and leave it to him as to how much the patient is told. I knew Mr. McCulloch personally at the time. I did not talk with him at this time with regard to his condition. Within a year from August 1926 I am sure that I talked Mr. McCulloch's condition over with him. I can't give a closer date because that is four years ago. I met Mr. McCulloch occasionally. I conveyed my findings to Dr. Alberty in writing. I have the original report here. Dr. Alberty lives in San Diego at present.

REDIRECT EXAMINATION

BY MR. MONROE

I am not sure that Mr. McCulloch asked me concerning his condition. My recollection is that at some time subse-

(Deposition of Dr. Lyle C. Kinney)

quent to the first examination or the taking of the first pictures I did have some talk with him. The paper which I have shown counsel is a copy of the original report which I handed to Dr. Alberty. (Report offered in evidence and copied in the record.) I took the Xray pictures personally. The pictures which I have identified are the original pictures.

The following is the report.

"Courtesy Name McCulloch James. Address 4275 Ingleside. Referred by Dr. Alberty. Account N. C. Dated 8/18/26. No. 15557

Date	Examination	Films and exposure
		8′X 10 - 11X14 - 14X17 D. F.
Portable Chest		Drs. Kinney & Elliott

"The left upper lobe shows fibroid infiltration extending from the apex down to the third rib. There are many small points of calcar*i*ous density in this area and there is thickened pleura above it.

This same infiltration obtains in the inner border of the upper right lobe. There is thickening of the pleura over the right chest and of the upper inter lobar septum. At the right base in the axilia there is an opaque area 10CM in diam*i*ter that has the density of fluid.

The findings at the apices are those of an old fibroid tuberculosis. There is evidence of fluid at the right base."

Plaintiff rests.

DR HERBERT STEFF ANDERTON,

a witness for the defendant, testified as follows:

DIRECT EXAMINATION

BY MR. KUNZEL.

I am a doctor, have been practicing 21 years. I graduated from the University of Maryland. I specialized in pulmonary tuberculosis for about four or five years. I specialized at the California Sanitarium, at Del Mar, California. Subsequent to that I was on the tubercular consulting board in France for about a year. I did nothing but chest work. I am acquainted with James McCulloch, Jr. I have known him ever since he opened the McCulloch Hospital. His mother formerly owned it and ran it, and he took charge of it a good many years go. That is my signature at the bottom of an application for reinstatement dated February 14th, 1927. I at that time examined Mr. McCulloch. (Referring to Defendant's Exhibit D) I made no clinical findings whatever as to existing T. B. I did not have X-rays before me. At that time my impression was that Mr. McCulloch had completely recovered from lobar pneumonia which he had in July 1926. His condition was perfectly healthy. I saw Mr. McCulloch between July 1926, and April 1927 at the McCulloch Hospital. It is difficult to state how often I saw him. I had patients there. It was a general hospital. He was the owner. I couldn't say how long he had operated it. It was a small private hospital, about 25 or 30 beds. It had existed for several years. After he recovered and returned to the hospital, I saw him every day. He was up and around and performing

(Testimony of Dr. Herbert Steff Anderton)

his usual duties. At the time I examined him he was performing his usual duties. I couldn't say the approximate date of his recovery. At the time I examined him in February, 1927, it was my understanding and impression he was performing his usual duties at the hospital. He also maintained that he was in perfect health.

CROSS EXAMINATION

BY MR. McKEE.

I feel myself competent to read X-ray pictures. (Plaintiff's Exhibits 12 and 13) show fluid in the base of the lung, and also some fibroid for deposit at the apices with calcareous deposits, which are the X-ray findings which you find in the apices of both these lungs, you can find in many, many supposedly normal individuals. My diagnosis from the X-ray is an unresolved pneumonia fluid. I would not make a diagnosis of active tuberculosis. The distinction between active and inactive tuberculosis is a mottling of your picture. It is difficult to state whether the patient of whom these pictures are taken had ever had active tuberculosis. The X-ray findings which are not correlated by clinical findings prove very little in chest conditions. I went by a combination of the clinical findings and the X-ray. I never saw any X-ray plates of Mr. McCulloch until this morning. I presume these are the X-ray plates of his. I never had any X-rays prior to the time I examined them on the stand. Never saw any. I couldn't say when Mr. McCulloch recovered, but I saw him around the hospital at the time, and sometime previous to the time I examined him for reinstatement. That was at the time and prior thereto that I made this examination in February 1927. I couldn't definitely state

(Testimony of Dr. Herbert Steff Anderton)

how long it was before this that I saw him around the hospital. I think he was away from the hospital several months during 1926. I couldn't say definitely what months. I couldn't say I was at the hospital every day. I didn't say I saw him every day. I saw him on occasions. Mr. McCulloch did not consult me as his physician when he came to see me. At the time I saw him he was applying for reinstatement of lapsed insurance policies, maintaining he was in perfect health. I was consulted as a physician of the insurance company. Paid by the company. In this particular instance I was not paid by the insurance company. No I was paid by the applicant for reinstatement. I am under that impression because that was the usual custom at that time. At that time I was the physician regularly employed by the Penn Mutual Life Insurance Company, as examining physician. At the time I examined Mr. McCulloch he was in my office about 15 or 20 minutes or half an hour. I do not remember ever examining him at any other time as to his physical condition.

REDIRECT EXAMINATION

BY MR. KUNZEL.

I examined him for life insurance pervious to that time, but not as to his physical condition from the standpoint of a patient. At the time he took out the Penn Mutual policies. That was in the fall of 1925. I gave him the ordinary life insurance examination. Aside from these, I made no other examination. Because of the history given me I made a careful examination of Mr. McCulloch's chest when he gave me the definite history of lobar pneumonia that he had in July 1925. My findings of that

(Testimony of Dr. Herbert Steff Anderton)
examination were negative, otherwise, I would not have recommended a reinstatement of his policies. I examined him in the fall of 1925 and again at the time of this examination for reinstatement.

BY MR. McKEE.

The X-ray plates which have been shown me show some fluid present. That condition frequently follows pneumonia, it is called pleurisy with effusion. It is also present in many cases of tuberculosis.

BY THE COURT.

Reading the X-ray plates he had fibrosis in the apices of both lungs with fluid in the base. Fibrosis condition indicates nature's protective measure in fighting T. B. We all have a certain amount of fibrosis in the chest. The fibrosis condition indicates that he had some irritation there at some time, not necessarily T. B. but possibly a T. B. in effect. As I read the plates, at that time it was inactive. Inactive means that it is not throwing off. There are two forms of T. B.—productive and non-productive. Productive T. B. we have in this fibrosis picture—in a productive T. B. we have a very poor looking picture where there is a throwing off of considerable exudate. In my judgment these pictures indicate a non-productive T. B. and a probable T. B. condition. His fibrosis is a protective measure against the breaking down of an active lesion. The fluid indicates irritation of the pleura. There are two forms of pleurisy, the dry pleurisy and pleurisy with effusion. In one the pleuretic walls become adherent and in the other they throw out the exudate and separate. These plates as far as the fluid is concerned indicate a pleurisy with effusion, which we very often get

(Testimony of Dr. Herbert Steff Anderton)
in an unresolved pneumonia. At the time these plates were taken I did not see any signs of an active T. B. there.

BY MR. McKEE.

I know Dr. Kinney. I employ him occasionally myself. I have no X-ray apparatus of my own. I employ several of the X-ray men. I don't think these plates indicate an active tuberculosis. It is difficult to say if they indicate any tuberculosis condition present owing to the fact I did not see the man with his clinical symptoms. In order to make a diagnosis, I would examine the plates in connection with the medical findings. I would attempt to diagnose an active T. B. without plates. I would not attempt to diagnose an active T. B. without clinical findings.

BY THE COURT. Dr. Anderton, I am showing you Dr. Kinney's form report from a reading of these plates. Tell me to what extent, if at all, you coincide with him without the aid of clinical examination? A Why, as far as the old fibroid t. b. is concerned, we can show an old fibroid t. b. in about 90% of the autopsies, of people.

The report shows some fibrosis, and finding of fluid in the right base. I found that and found many small points of calcareous density in the area. There is no essential difference in the opinion of Dr. Kinney and myself in the reading of these plates.

BY MR. KUNZEL.

From Exhibits 12 and 13 and having read Dr. Kinney's report I would say there was no active tuberculosis existing.

(Testimony of John D. Cornell)

JOHN D. CORNELL,

A WITNESS ON BEHALF OF THE DEFENDANT, TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. KUNZEL.

In 1927 I was County Detective. I live in San Diego. Have lived here forty years. I know the plaintiff, James McCulloch, jr. I met him the first time in 1927. I wrote some letters to him out of the District Attorney's office in 1927. I wrote in my official capacity. I searched through the files in 1930 to ascertain copies of the letters written to Mr. McCulloch. I found either one or two. The letter dated March 7th, 1927, is a copy of a letter I wrote to Mr. McCulloch. The letter dated March 16th, 1927, is a copy of a letter I wrote to Mr. McCulloch. I think these are all of the letters or copies of the letters that I wrote to Mr. McCulloch. (Letter dated March 7th, 1927, offered in evidence marked Defendant's Exhibit K, and letter dated March 16th, 1927, offered in evidence marked Defendant's Exhibit L, and received in evidence.) At the time I made search I also searched for other letters and found no other copies.

Defendant's Exhibit K, is as follows:

March 7th, 1927.

Mr. James McCulloch, Jr., care of McCulloch Hospital,
914 Beech St., San Diego, California.

Dear Sir:

Please call at this office at your earliest convenience and ask for the undersigned.

Yours truly,
Stephen Cornell
District Attorney
By Chief Investigator.

(Testimony of John D. Cornell)

Defendant's Exhibit L is as follows:

Mr. James McCulloch, Jr.,
Care of McCulloch Hospital
914 Beech St.
San Diego, California.

Dear Sir:

Under the date of March 7th, I wrote you asking that you call at this office.

We have had no response from you and unless a response is made to this office personally a warrant will be issued for your arrest. This communication is final, and trust that you will take advantage of the opportunity that is given you.

Yours very truly,
Stephen Cornell
District Attorney
By John D. Cornell,
Investigator.

The letters were written on account of some checks. The checks were given to nurses at the hospital for labor. The nurses had given me these checks.

CROSS EXAMINATION

BY MR. McKEE.

I don't know whether Mr. Peterson came to see me about a check or not. It is so long ago. I have seen the check represented by plaintiff's Exhibit 7. That is the check for $300.00. That was lying on the desk with the other checks. I had that check with the other checks. Don Carrel brought it in. I asked Mr. McCulloch about the check and he told me he had given it to Mr. Carrell and it was post dated. I told Mr. Carrell there could be nothing done about it. I never had the check officially. I had it in my possession with the rest of the checks.

(Testimony of Mrs. Louise Barnett—Charles L. Randolph)

MRS. LOUISE BARNETT,

a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MR. KUNZEL.

I reside at 848 Beech Street, across the street from the McCulloch Hospital. I have been employed at the McCulloch Hospital a little over four years. I was first employed January 11, 1927. I resigned just a few days before the receiver took over the hospital. I resigned about the 27th or 28th of March 1927. I saw Mr. McCulloch around the hospital between January and March 1927. I cannot say how frequently. Not every day. I don't know whether it was every other day. He seemed to be in the office most of the time he was at the hospital. He would be up there more than once a week. It is hard to answer whether or not he was there two or three times a week. I used to see him in the office. The office was enclosed and I could not say whether he did any work or not. He had an office girl. I don't know whether he attended to business or not. I can't say. I think I saw him there half a day at a time. Just occasionally.

CHARLES L. RANDOLPH,

a witness on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MR. KUNZEL:

I am in the life insurance business. I have an agency in San Diego. General Agent for the Penn Mutual Life Insurance Company of Philadelphia. Have been such for 30 years. I am acquainted with Mr. McCulloch. I be-

(Testimony of Charles L. Randolph)

lieve I have known him since 1925, in connection with his dealings with the office. I believe that is the date of his insurance. The books and records of the Company are kept under my supervision. I am familiar with the books to some extent, we have a cashier with us. We have a record of the payments of Mr. McCulloch of the policy of insurance that he took out No. 1196774. (Record introduced in evidence). Defendant's Exhibit M offered in evidence, ledger card, which is as follows:

"Name, James McCulloch, Jr., Net amount. Born, 12/6/93 Premium age 32, Net amount, $15,000, Premium annual 4-1340 O. L. Accedali, beneficiary, Anna R., City of San Diego. Due 11/27/25, S. O. L. Agent D. C. Carrell. Premium date 11/27/25, Agency Hancock & Randolph, Relationship, wife. State California."

The entries as to the amounts show, 19-25 and opposite that entry premium charges paid 2/28/27 $185.40 1926 year, and under the heading of surplus $84.30.

The entries in that card show the insured paid nothing, and after the note was passed then we couldn't collect it. The card does not indicate that he even had a note on it, but when we finally failed to get him to pay the premium, our company turned this over on the term insurance rate. We, of course, paid that ourselves after the assured did not pay. Term insurance is the actual cost of carrying insurance for death benefit only for a stipulated period of time. $185.40 is the Company's charge. The $84.80 is the surplus the assured would have been entitled to had he paid the premium. The charge of the Company is $185.40. That is what I lost in the transaction. I am

(Testimony of Charles L. Randolph)

the agent. As to policy No. 1196774 we accepted a memorandum note for the full amount of the first premium. We have a ledger card for policy No. 1196773. The entries on that card are identical with the other card except they differ in amount. That is the $5,000 policy and the other is $15,000. The term insurance charged to me is $48.00. These two policies were issued at the same time. We received for payment on these two policies the note marked Plaintiff's Exhibit 5. Defendant's exhibits C and B mean a cancellation of the insurance in order that we may get out from the full annual premium. They bear date December 30th, 1926 and have reference to policies #1196774 and #1196773. We received a check from Mr. McCulloch when he attempted to be reinstated. He attempted to be reinstated Feb. 14th 1927, at that date we received a check, Plaintiff's Exhibit 7. The check was dated Feb. 24th. I did not attempt to collect that check. We presented the check to the bank for collection. Payment was not made on the check, it was a no good check. We received nothing on those two policies at any time. The term charge was paid by us. Mr. McCulloch paid nothing. The term charge was charged back to the agent. The term charge is the actual charge for insurance for death only. It provides no other, no commission. No waiver of premium for disability or commission. We have a ledger card for policy No. 1191014. The other two policies were never reinstated. We had a ledger card on the A policy. The record shows as to the payments on the A policy on December 12, 1925 he paid $150. and on September 8, 1926 he paid $156.60, plus $74. interest paid. That constituted the first annual premium

(Testimony of Charles L. Randolph)

on that policy. He signed a note for the second annual premium, Plaintiff's Exhibit 6. That note was never paid to our office. We had to pay out the term insurance for the second year. It was $42.98. Received no further payment of the premium on that policy except the note. At the time of the signing of the note policy surrender we invariably return the note. That is stated in the terms of the surrender. We received nothing on policy No. 1191014 after 1926, except the note. The notes were made payable to the Penn Mutual Life Insurance Co., of Philadelphia. Mr. Don Carrell was in our employ in 1926. He is now ill at his home. He is about as near dead as a man can be and still be alive.

CROSS EXAMINATION

BY MR. McKEE.

I do not recall whether I personally took these policies up from Mr. McCulloch. I have no recollection of every doing it. As far as I know I didn't take them up. I don't know whether they were taken up or not. I don't know whether I personally surrendered Exhibit 5 to Mr. McCulloch. I have no recollection about surrendering it. All I know is what the record shows. We received from Mr. Carrell the term charges, whatever that shows on policies B and C. We received $185.40 on policy No. 1196774 and $48 on policy No. 1196773. Part of the difference between the two amounts $233.40 and $339.39 was personal between Mr. McCulloch and Mr. Carrell. I don't know what that represents. (Letter, Plaintiff's Exhibit 14 for identification). That is part of the record of my files. The total amount of the term charge for which Mr. McCulloch gave his note to Mr. Carrell per-

(Testimony of Charles L. Randolph)

sonally was $276.29, and there was an item of $64.79, which I understood represented a check which he took up for Mr. McCulloch in order to prevent him from being criminally prosecuted and he included this in the note to Mr. Carrell. I cannot explain the different between the $279 and the $233.40. I have here a figure of $339.39, (Exhibit No. 14 offered in evidence) and is as follows:

"4" which is B. "October 9th, 1929. Robert Dechert, V. P. & Counsel. C. L. Randolph & Son, General Agents.

"Replying to your wire of today, we endeavored, of course, to collect the premium on this insurance, but failing utterly, our agent, Don C. Carrell, called upon Mr. McCulloch at his office (we haven't the exact dates), and Mr. McCulloch said that he positively could not carry the insurance and would have to drop it. Mr. Carrell reminded him of his illness the previous year and told him that there was a possibility that he could not secure new insurance again, whereupon Mr. McCulloch told him that his doctors had released him pronouncing him cured and that he had no fear but that he could secure all the life insurance he desired. Therefore, note releases were signed and his premium notes delivered to him.

We were billed Feb. 21, 1927 for term insurance as follows:

Policy No. 1196773, (which is C) $ 48.00

Policy No. 1196774, (which is B) $185.40

Policy No. 1191014, (which is A, in typewriting) $41.20 (and then the figures in pencil), $42.98.

Total (in typewriting) $274.60 (and in pencil), $276.29.

This was paid by our agent, Don C. Carrell, and he has McCulloch's note for this amount, plus $64.79, representing a check which McCulloch issued that was not good

(Testimony of Charles L. Randolph)

and which Mr. Carrell paid to save criminal action being brought against him. Total amount of the note which Mr. Carrell holds is $339.39. McCulloch has not at any time paid one cent on it. The note, of course, is individual, and the Penn Mutual's name is not mentioned.

The insurance was voluntarily lapsed by Mr. McCulloch and he very readily signed note release. We do not see that he has a chance of sustaining an action. We received a letter from your Los Angeles attorneys today in which they stated that they would call upon us early next week. We are ready and willing and will be glad to do all we can to help defend the Penn Mutual against this unjust claim.

Very truly yours,

C. L. Randolph and Sons,
General agents.
per C. L. Randolph."

CLR-CVT.

The telegram is as follows:

"C. L. Randolph and Son,
504 Union Bldg.,
San Diego, Calif.

October 9, 1929.

Please write me at once detailed account of all events having to do with note policy surrender of policies eleven ninety six seven seventy three and four and eleven ninety one naught fourteen, James McCulloch, Jr. This should include a statement from Don C. Carrell, sub agent."

(Testimony of Charles L. Randolph)

I do not have a statement by Mr. Carrell in my files. He didn't make any statement. I embodied the substance of Mr. Carrell's early statement in the letter. I did not make any additional statement to this. Our record shows a charge for term insurance on policy A, No. 1191014, $42.98. That was paid February 19, 1927 by our agency. Don Carrell paid it subsequent to that date. I do not know the date it was paid. My letter refers to when we paid it. The best information that I have before me was that it was in force for four months and four days. I cannot state from what date to what date the policy was in force. This term insurance was on the second year premium. That would be October 1926 to February 19th. There was $56.20 surplus accrued on that policy the first year, but it was not available except on payment of second years premium. The policy was in force for four months and four days after its first anniversary date. The premium on the policy that was in force for four months and four days was paid by the term charge $42.98. The $48.00 and the $185.40 paid the full year's insurance on that and the other one. It was the full year's insurance on both policies B and C. It shows that they were cancelled after the anniversary. Those were paid to me by Mr. Carrell. He was the agent in my office. I am reasonably familiar with these policies. There would be dividends on those policies assuming that they remained in force, he would be entitled not only to the benefits of the diability provisions of the policies, but the premiums having been paid or the waiver he would be entitled to the dividends. That is correct, but I cannot compute the exact amount at this time. I can only approximate it.

(Testimony of James McCulloch, Jr.)

MR. McCULLOCH RECALLED

BY MR. MONROE:

Mr. Carrell claimed that he took up that $300 check; that is what he claimed when I gave him that note. No other check. There was no personal transaction between us and no debt outside of the insurance money. The note for $339.39 was the amount due on the check and also surrendered that policy and he told me it was the difference between the $300 and $339 that was for short term insurance. The note marked "Paid in Full" of March 28th, was actually paid.

CROSS EXAMINATION

BY MR. GIRLING.

When he spoke about the note policy surrender there was something said to me about having to pay it himself. He told me the Company charged him with the insurance and I gave him the note. He claimed he took up the $300 check and I felt the Company must have gotten the money. The check has never been cashed. Never cleared.

Dated: April................., 1932.

A. L. WISSBURG
WRIGHT & McKEE
By C M Monroe
Attorneys for Plaintiff

Service of the foregoing proposed statement of evidence and receipt of a copy thereof this 27 day of April, 1932, is hereby admitted and acknowledged.

O'Melveny, Tuller & Myers
And J. R. Girling
And L. M. Wright
Attorneys for Defendant

It is hereby stipulated and agreed that the above and foregoing statement of evidence is true and correct and may be approved by the judge without notice.

A. L. WISSBURG
WRIGHT & McKEE
By C M Monroe
Attorneys for Plaintiff and Appellant

O'MELVENY, TULLER & MYERS,
And J. R. Girling
And L. M. Wright
Attorneys for Defendant and Appellee

On this 28th day of April, 1932, the foregoing statement having been presented to me, the same is hereby in all things allowed and approved, and the same is hereby ordered filed as a statement of the evidence to be included in the record of appeal in the above styled and numbered cause as provided in paragraph (B) of Equity Rule 75.

John M. Killits
Judge.

[Endorsed]: Filed May 6 1932 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

PETITION FOR APPEAL

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION:

JAMES McCULLOCH, JR., your petitioner, who is the plaintiff in the above entitled cause, prays that he may be permitted to take an appeal from the judgment entered in the above entitled cause on the 19th day of May, 1931, and from the order denying petition for rehearing thereafter entered on the 12th day of October, 1931, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith.

And your petitioner desires that said appeal shall operate as a supersedeas and therefore prays that an order be made fixing the amount of security which said plaintiff shall give and furnish upon such appeal, and that upon giving such security all further proceedings in this Court be suspended and saved until the determination of said appeal by the Circuit Court.

Dated: December 26th, 1931.

A. L. Wissburg
Wright & McKee
by L. A. Wright
D McKee
C. M. Monroe
Attorneys for petitioner

ORDER ALLOWING APPEAL

And now on the 28 day of December, 1931, on the presentation and consideration of the foregoing petition, IT IS ORDERED that said appeal be allowed as prayed for upon plaintiff's giving bond as required by law in the sum of 250 Dollars, and that bond for said sum submitted by plaintiff with said petition be and the same is hereby in all respects approved.

Curtis D. Wilbur
Circuit Judge

[Endorsed]: Received copy of the within document Jan 4 1932 O'Melveny, Tuller & Myers By (Invalid unless Countersigned) M. A. T. Filed Dec 26 1931 R. S. Zimmerman Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the said JAMES McCULLOCH, JR., plaintiff in the above entitled cause, and files the following assignment of errors upon which he will rely in the prosecution of the appeal herewith petitioner for in said cause from the judgment of this Court entered on the 19th day of May 1931, and the Order denying Petition for Rehearing entered on the 12th day of October, 1931.

1. The Court erred in finding and adjudging that the evidence offered on behalf of the plaintiff did not establish that the plaintiff had become totally and permanently disabled as the term is defined in the policies of insurance

sued upon, during the time such policies were in force and particularly in that the undisputed evidence introduced by the plaintiff shows without substantial conflict that such disability occurred during such period.

2. The Court erred in finding and adjudging (Findings of Fact, Paragraph IV) "that it is not true that before the second anniversary date of said premium, and, to-wit: on July 31st, 1926, and before the sixtieth anniversary of the age of the insured, plaintiff was taken sick and became ill with a bodily ailment and disease, to-wit: pulmonary tuberculosis; that it is not true that plaintiff was compelled to remain confined to his home from July 31st, 1926, until April 9, 1927; that it is not true that plaintiff was confined to his bed and compelled to remain therein from April 9, 1927, to the latter part of August 1927. That it is not true that in consequence of said illness and disease plaintiff became and was permanently and totally disabled from engaging in any occupation whatsoever for remuneration or profit. That it is not true that said disease, independently from all other causes, and within the terms of said insurance, has resulted in permanent disability, wholly incapacitating plaintiff from engaging in any occupation whatsoever for remuneration or profit from July 31st, 1926, continuing to the date of filing of plaintiff's bill" in that the undisputed evidence shows without substantial conflict that the matters and things thus referred to in Paragraph IV of said Findings of Fact were true, and should have been so found by the Court.

3. The Court erred in finding and adjudging (Findings of Fact, Paragraph V) "That it is not true that the giving and accepting of said note continued said policy

No. 1191014 and the benefits thereunder, in force, to October 14th, 1927"—that such Finding amounts to a Conclusion of Law, and that the undisputed evidence shows, without substantial conflict, that the same was true and should have been so found by the Court.

4. The Court erred in finding and adjudging (Findings of Fact, paragraph V) "that it is true that said note was returned to plaintiff upon March 18th, 1927, and said policy of insurance cancelled" in that the undisputed evidence shows, without substantial conflict, that the same was not true, and should have been so found by the Court.

5. The Court erred in finding and adjudging (Findings of Fact, paragraph V) "That it is not true that at or about the same time (November 14, 1926) plaintiff, in payment of premiums on said two last mentioned policies of insurance (Nos. 1196773 and 1196774), made and delivered at the request of defendant's said agent in the City of San Diego, California, a post-dated check in the sum of $300.00" in that the undisputed evidence shows without substantial conflict that the same was true, and should have been so found by the Court.

6. The Court erred in finding and adjudging (Findings of Fact, paragraph V) "That it is true that said policies of insurance lapsed for non-payment of premium on each policy on October 27, 1926, and were carried in force by defendant until November 28, 1926, the expiration of the grace period of each; that said policies, and each of them were surrendered by plaintiff as respects the benefits of each policy, upon December 30, 1926, and plaintiff's said note returned to him" That said Finding is a Conclusion of Law, and the undisputed evidence

shows, without substantial conflict, that the same was not true, and should not have been so found by the Court.

7. The Court erred in finding and adjudging (Findings of Fact paragraph V) "That it is not true that shortly after the date mentioned in said check, as its due date, or at any time, the general agent of the defendant Corporation in the City of San Diego California, threatened plaintiff with criminal prosecution for the issuance and non-payment of said check and delivered said check over to the District Attorney of the County of San Diego, California, for criminal action and prosecution thereon" That the undisputed evidence shows, without substantial conflict, that the same was true, and should have been so found by the Court.

8. The Court erred in finding and adjudging (Findings of Fact paragraph V) "That it is not true that plaintiff because of his said illness and disease, being unable to follow or engage in any occupation for remuneration or profit, was unable to pay said note and said check when due, respectively.

That it is not true that defendant, by and through its general agent and representative in San Diego, California, wrongfully and fraudulently demanded that return and surrender of said policies of insurance #1196773 and 1196774 and/or policy #1191014, and/or threatened plaintiff with further, or any, criminal prosecution should he fail or refuse to so surrender said policies or insurance to defendant." in that the undisputed evidence shows without substantial conflict that the same was true, and should have been so found by the Court.

9. The Court erred in finding and adjudging (Findings of Fact par. V) "That it is true that upon March

18, 1927, plaintiff surrendered to defendant said policy No. 1191014 and executed a note policy surrender in respect to same; that at said time plaintiff received from defendant all notes given as premium for said policy." in that the undisputed evidence shows without substantial conflict that the same was not true, and the Court should have so found.

10. The Court erred in finding and adjudging (Findsings of Fact par. VI) "That plaintiff was advised of his true condition, and the true and exact nature of his illness and disease prior to June 13, 1927. That it is not true that plaintiff was stricken with pulmonary tuberculosis on July 31, 1926, the date of his first confinement to his bed; that it is not true that because of fraud and duress practiced upon plaintiff and/or because plaintiff was not in possession of said policies of insurance, and/or in ignorance of the disability features therein mentioned that plaintiff was unaware of the requirements of the policy of insurance No. 1191014 relative to notice and proofs in the event of permanent and total disability until on or about April 10, 1929" That the undisputed evidence shows, without substantial conflict, that the same was true, and should have been so found by the Court.

11. The Court erred in finding and adjudging (Findings of Fact par. VII) "That no payments under said policy of insurance No. 1191014 were due to plaintiff in accordance with the terms and provisions of said policy of insurance" and "and that at said time, (March 26, 1929) said policy of insurance was no longer in force by reason of its having lapsed for non-payment of premiums and a note policy surrender of the same having been executed by plaintiff cancelling and surrendering all of

plaintiff's rights or benefits thereunder upon March 18, 1927". That the undisputed evidence shows, without substantial conflict, that the same was not true, and should have been so found by the Court. Also said Finding is a conclusion of law.

12. The Court erred in finding and adjudging (Finding of Fact par. Viii) "That it is true that said policy of insurance No. 1191014 lapsed by reason of non-payment by plaintiff of the premiums due thereon" That said proposed finding is a Conclusion of Law.

13. The Court erred in finding and adjudging (Findings of Fact par. XII) and the whole said paragraph, for the reasons assigned in Assignment of Errors, marked 2, hereof.

14. The Court erred in finding and adjudging (Findings of Fact XIII) "That it is true that said policy of insurance No. 1196774 lapsed for non-payment of premium upon October 27, 1926.... That it is true that said policy of insurance was surrendered by plaintiff on December 30, 1926, to defendant, at which time the note given by plaintiff as the first year's premium thereon was returned to plaintiff" for the reason that said proposed finding is a Conclusion of Law, and the further reason that the undisputed evidence shows, without substantial conflict, that the same was not true, and should have been so found by the Court.

15. The Court erred in finding and adjudging (Findings of Fact par. XIV) "That all the allegations contained in paragraph XIV of plaintiff's complaint are true, except that plaintiff was advised by his physician that he was suffering from tuberculosis prior to June 13, 1927; that it is not true that plaintiff had been suffering, or

was stricken with pulmonary tuberculosis on July 31, 1926; that it is not true that plaintiff had been prior to on or about April 10, 1927 suffering with pulmonary tuberculosis, or that he had been prior to April 10, 1927, totally and permanently disabled from engaging in any occupation for remuneration or profit; that it is not true that because plaintiff was not in possession of said policy of insurance, or because of fraud and duress practiced upon plaintiff by the defendant's agent and representative plaintiff was in ignorance and unaware of the requirements of said policy of insurance relative to notice and proof; that it is not true that plaintiff did not become aware that he was suffering from a disability until on or about April 10, 1929; that it is not true that the failure of plaintiff to have possession of the policy #1196774 was due to any fraud and/or duress practiced upon plaintiff by the defendant or any of its agents; that it is not true that plaintiff was in ignorance of the disability features mentioned or contained in said policy of insurance; that it is not true that plaintiff was not aware of the requirements of said policy of insurance relative to notice and proofs to be furnished to defendant in the event of total and permanent disability of plaintiff." for the reason that the undisputed evidence shows, without substantial conflict, that the same was true and should have been so found by the Court.

16. The Court erred in finding and adjudging (Findings of Fact par. XIV) "That it is not true that said policy of insurance, upon July 6, 1927, covered plaintiff, and would enable plaintiff to be entitled to the benefits mentioned and recited in said policy of insurance" for the reason that said proposed finding is a Conclusion of Law,

and for the further reason that the undisputed evidence shows, without substantial conflict, that the same was true and should have been so found by the Court.

17. The Court erred in finding and adjudging (Findings of Fact par. XIV) "That it is true that said policy of insurance was surrendered by plaintiff and a note policy surrender executed by plaintiff respecting the same upon December 30, 1926. That it is true that said policy of insurance by its terms lapsed for non-payment of premiums upon November 28, 1926" for the reason that the undisputed evidence shows, without substantial conflict, that the same was not true, and should have been so found by the Court.

18. The Court erred in finding and adjudging (Findings of Fact par. XV) "And that on said date, March 26, 1929, said policy of insurance #1196774 was not in force and effect for the reason that said policy of insurance had lapsed for non-payment of premiums and plaintiff, by the execution of a form of note policy surrender had, upon December 30, 1926, released and surrendered all his rights under said policy of insurance in consideratio*b* of the return to him of his unpaid promissory note in the principal sum of $551.20, given by him on or about November 27, 1925, to defendant for premiums upon said policy of insurance, together with the policy of insurance #1196773" for the reason that said proposed finding is a Conclusion of Law and for the further reason that the undisputed evidence, without substantial conflict, shows that the same was not true, and should have been so found by the Court.

19. The Court erred in finding and adjudging (Findings of Fact. par. XVI) "that it is true that plaintiff

never submitted to defendant any claim in respect to disability under the provisions of said policy of insurance #1196774 while said policy of insurance was in force and/or effect" for the reason that said proposed finding is a Conclusion of Law, and that the undisputed evidence shows, without substantial conflict, that the same is not true, and should have been so found by the Court.

20. The Court erred in finding and adjudging (Findings of Fact par. XVIII) "except "that said promissory note in the sum of $551.20 was tendered to defendant by plaintiff for the payment of premiums upon policies of insurance #1196773 and #1196774", for the reason that the evidence shows without substantial conflict that the same was true, and should have been so found by the Court.

21. The Court erred in finding and adjudging (Findings of Fact par. XX), and the whole of said paragraph, for the reasons assigned in Assignment of Errors, marked 2, hereof.

22. The Court erred in finding and adjudging (Findings of Fact par. XXI) "That none of the allegations contained in Paragraph XXI of plaintiff's complaint are true" for the reason that the evidence shows, without substantial conflict, that the allegations therein contained are true, and should have been so found by the Court.

23. The Court erred in finding and adjudging (Findings of Fact par. XXII) "except that plaintiff was not advised by his physician that he had tuberculosis on or about July 6, 1927, but as so advised prior to April 10, 1927; that it is not true that plaintiff was advised that he was stricken with pulmonary tuberculosis on July 31,

1926; that it is not true that plaintiff was stricken with tuberculosis on July 31, 1926; that it is not true that because of any fraud or duress practiced upon plaintiff by defendant's agent and/or representative plaintiff was unaware of the disability provisions in said policy of insurance and/or the requirements of said policy of insurance relative to noice and proof to be furnished defendant; that it is not true that plaintiff first knew the requirements of said policy of insurance relative to notice and proof in the event of total and permanent disability and/or was unaware of the disease and illness with which he was suffering until on or about April 10, 1929; that it is not true that the failure of plaintiff at any time to have possession of policy #1196773 was due to any fraud and/or duress practiced upon plaintiff by defendant or any of its agents" for the reason that *he* evidence shows, without substantial conflict, that the same was true and should have been so found by the Court.

24. The Court erred in finding and adjudging (Finding of Fact. par. XXIII) "except it is not true that said policy of insurance #1196773 was in full force and effect at the time plaintiff requested claim blanks from defendant for the purpose of filing his claim for total and permanent disability benefits on or about March 26, 1929. That it is true that policy #1196773 had lapsed for non-payment of premiums on November 28, 1926, and upon December 30, 1926, plaintiff had executed a note policy surrender surrendering each and all of the benefits under said policy in consideration of the return to him of his unpaid note for $551.20 and the release of his liability under said note" for the reason that said purported find-

ings are Conclusions of Law, and the evidence shows, without substantial conflict that said policy of insurance was in full force at said time and had not lapsed for non-payment of premium.

25. The Court erred in finding and adjudging (Findings of Fact XXIV) "That none of the allegations contined in paragraph XXIV of plaintiff's complaint are true. That it is true·the plaintiff did not submit any claim to defendant as respects the disability of plaintiff under the provisions of policy #1196773 while said policy was in force and/or effect" for the reason that said proposed finding is a Conclusion of Law.

26. The Court erred in finding and adjudging (Findings of Fact par. XXV) "That there was no sharp practice, fraud or deceit engaged in by the defendant in any way in December 1926, and in March 1927, when plaintiff surrendered to defendant his three policies of life insurance #1196773, #1196774 and #1191014, and gave and executed the several note policy surrenders respecting the said policies of insurance" for the reason that the evidence shows, without substantial conflict, that the same was true, and should have been so found by the Court.

27. The Court erred in finding and adjudging (Finding of Fact par. XXV) "That each of said surrenders definitely and permanently terminated any responsibility of defendant to plaintiff growing out of the several policies of insurance" for the reason that said purported finding is a Conclusion of Law, and does not find support in the evidence.

28. The Court erred in finding and adjudging (Finding of Fact par. XXV) "That that certain promissory

note in the sum of $339.39 executed by plaintiff under date of April 19, 1927, and given to the defendant's agent, was executed as an individual monetary transaction between plaintiff and said agent, and in payment for moneys paid by said agent for the use of plaintiff" for the reason that the evidence shows, without substantial conflict, that the same is not true and should have been so found by the Court.

29. The Court erred in finding and adjudging (Finding of Fact XXVI) "That plaintiff was duly advised in the midsummer of 1927 as to his true physical condition; that plaintiff failed and neglected to present any claim to defendant until March 1929, and said delay on the part of plaintiff to proceed under the three insurance policies which he had surrendered to defendant's agent after default in the payment of premiums or premium notes was an unreasonable delay; that such delay in presentation of proofs or claims by plaintiff worked to the disadvantage of defendant because of the intervening disability of defendant's agent and principal witness, Carrell; and was such as to make plaintiff's respective claims as to his three demands for disability stale, and to establish the defense of laches interposed by defendant as to each of the three causes of action in plaintiff's complaint, independent of the mere length of time" for the reason that said purported finding is a Conclusion of Law, and for the further reason that the evidence shows, without substantial conflict, that the same was not true, and the Court should have so found.

30. The Court erred in finding and adjudging (Findings of Fact par. XXVII) "that on said respective dates,

August 10, 1927, and March 28, 1928, when plaintiff so made his aforesaid applications for disability benefits to Metropolitan Life Insurance Company and to Acacia Mutual Life Association, plaintiff has surrendered all benefits in and to policies of insurance #1196773, #1196774 and #1191014", for the reason that said purported finding is a Conclusion of Law, and for the further reason that the evidence shows, without substantial conflict, that the same was not true, and should have been so found by the Court.

31. The Court erred in finding and adjudging that the claim of plaintiff upon the insurance policies issued by the defendant was barred by laches, for the reason that the facts are established by the undisputed evidence produced at the trial that plaintiff failed to make demand for the disability benefits provided by the terms of said policies at the time he became totally permanently disabled, as such disability is therein defined, because of his ignorance of the existence of such total permanent disability, and the undisputed evidence further establishes that he acted promptly in making his demands upon defendant company immediately upon learning of his rights, and in the meantime the position of defendant company had not changed in any respect to its detriment by reason of the lapse of time.

32. The Court erred in holding and adju*di*ng that said policies of insurance issued by defendant to plaintiff were canceled and terminated and therefore unenforceable, for the reason that the undisputed evidence establishes that the purported agreements of cancelation and surrender of said policies were entered into without considera-

tion and were made as a result of a mutual mistake of fact between the parties, in that at the time of said cancelation agreements the plaintiff had become permanently and totally disabled, as such disability is defined by the terms of said policies, and instead of premiums being due and payable to defendant company, as was then believed by both parties, in fact the premiums were waived by the terms of said policies by reason of plaintiff's disability, and the disability benefits provided by said policies were due and owing to the plaintiff from the defendant, and that at said time both plaintiff and defendant were ignorant of the existence of said total permanent disability and believed that the illness from which plaintiff was suffering was temporary in character.

33. The Court erred in rendering judgment against the plaintiff for costs.

34. The Court erred in denying plaintiff's Petition for Rehearing herein.

35. The Court erred in rendering judgment herein in favor of defendant and against the plaintiff.

WHEREFORE, plaintiff prays that said Judgment may be reversed, and for such other and further relief as the Court may deem meet and proper.

Dated: December 26th, 1931.

A. L. Wissburg
Wright & McKee
by L. A. Wright
D. McKee
C. M. Monroe

[Endorsed]: Received copy of the within document Jan 4 1932 O'Melveny, Tuller & Myers By (Invalid unless Countersigned) M. A. T. Filed Dec 26 1931 R. S. Zimmerman Clerk By Edmund L Smith Deputy Clerk

[Title of Court and Cause.]

SUPERSEDEAS AND COST BOND

KNOW ALL MEN BY THESE PRESENTS:

That we, JAMES McCULLOCH, JR., as principal, and MARYLAND CASUALTY COMPANY, as surety, are held and firmly bound unto PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a corporation, in the full and just sum of TWO HUNDRED FIFTY AND no/100 Dollars, to be paid to the said defendant, its successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of January, 1932.

WHEREAS, lately at the January term of the United States District Court, in and for the Southern District of California, Southern Division, in a suit pending in said Court between James McCulloch, Jr., plaintiff, and said PennMutual Life Insurance Company of Philadelphia, a corporation, defendant, a judgment was rendered against the said plaintiff for costs, and the said plaintiff has petitioned for and been allowed by this Court an appeal to the United States Circuit Court of Appeals, and a citation has been directed to the said defendant citing it to appear in the United States Circuit Court at San Francisco, California, thirty (30) days from and after the date of such citation.

Now the condition of the above obligation is such that if the said James McCulloch Jr. shall prosecute said ap-

peal to effect, and answer all damages and costs if he fails to make good his plea, then the above obligation to be void, otherwise to remain in full force and effect.

James McCulloch Jr.
Principal

[Seal] Maryland Casualty Company
Surety

By F. F. Edelen
(F. F. Edelen) Its Attorney-in-Fact.

APPROVED: San Francisco, California, January 12, 1932.

Curtis D. Wilbur
Senior U. S. Circuit Judge.

STATE OF CALIFORNIA }
County of San Diego } ss.

On this 11th day of January, 1932, before me, C. T. NEILL, a Notary Public, in and for the County of San Diego, State of California, residing therein, duly commissioned and sworn, personally appeared F. F. Edelen, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of MARYLAND CASUALTY COMPANY, the corporation that executed the within instrument, and acknowledged to me that he subscribed the name of MARYLAND CASUALTY COMPANY thereto as principal and his own name as attorney in fact. I further certify that said instrument was executed by said F. F. Edelen as attorney in fact of MARYLAND CASUALTY

COMPANY in my presence, and that his signature thereto is genuine.

WITNESS my hand and seal the day and year in this certificate first above written.

[Seal] C. T. Neill

Notary Public in and for said County and State.

[Endorsed]: Filed Jan. 13, 1932. R. S. Zimmerman, Clerk, by Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

STIPULATION RE CERTAIN EXHIBITS.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled action through their respective counsel that the Clerk of the above entitled court, in preparing the printed transcript of record on appeal in said cause, may omit insertion of X-rays and in lieu thereof certify to the Clerk of the Circuit Court of Appeals the originals of such X-rays.

Dated this 9th day of May, 1932.

Wright & McKee
Wright & McKee,
J. M. B.
Attorneys for Plaintiff.

J R Girling
O'Melveny, Tuller & Myers, & J R Girling
Attorneys for Defendant.

[Endorsed]: Filed May 9-1932 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

[Title of Court and Cause.]

STIPULATION RE PRINTING OF TRANSCRIPT.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled action through their respective counsel that the Clerk of the above entitled court, in preparing the printed transcript of record on appeal, may omit the headings of all papers filed except the citation and the complaint, substituting in the place and stead thereof the phrase: "Title of Court and Cause," and that said Clerk may also omit all backs of documents except the filing endorsement.

Dated this 9th day of May, 1932.

Wright & McKee J M B.
Wright and McKee,
Attorneys for Plaintiff.

J R Girling
O'Melveny, Tuller & Myers, & J R Girling
Attorneys for Defendant.

[Endorsed]: Filed May 9-1932 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

---

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

TO THE CLERK OF THE ABOVE COURT:

YOU ARE REQUESTED to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above entitled cause and to include in such

transcript of record the following and no other papers or exhibits:

1. Complaint.
2. Answer of defendant.
3. Statement of the evidence, including the exhibits offered at the trial.
4. Judgment rendered by the trial Court.
5. Plaintiff's petition for rehearing.
6. Order denying petition for rehearing.
7. Petition for appeal and order allowing same.

7-A. Assignment of errors.

8. Citation on appeal.
9. This praecipe and service thereof.

Said transcript to be prepared as required by law and the rules of this Court and rules of the United States Circuit Court of Appeals for the Ninth Circuit and to be filed in the office of the Clerk of the Circuit Court in San Francisco, California, on or before the....................day of ...., 193...., (pursuant to the order of this Court enlarging and extending said time.)

Dated: June 2nd, 1932.

A. L. Wissburg
Wright & McKee
C. M. Monroe
Attorneys for appellant

Service of the above praecipe accepted and acknowledged this 4 day of June, 1932.

O'Melveny, Tuller & Myers
& J. R. Girling
By J. R. Girling
Attorneys for appellee

[Endorsed]: Filed Jun 7-1932 R. S. Zimmerman, Clerk. By Edmund L. Smith Deputy Clerk.

[Title of Court and Cause.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 253 pages, numbered from 1 to 253 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; complaint; answer; opinion; findings of fact and conclusions of law; decree; petition of plaintiff for rehearing and order to show cause; opinion on petition for rehearing; order denying motion for rehearing; agreed statement of evidence; petition for appeal and order allowing appeal; assignment of errors; supersedeas and cost bond; stipulation re certain exhibits; stipulation re printing of transcript and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to............... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this............ day of May in the year of Our Lord One Thousand Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-sixth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 6873

IN THE

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

James McCulloch, Jr.,
Appellant,

vs.

The Penn Mutual Life Insurance Company of Philadelphia, a corporation,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

APPELLANT'S OPENING BRIEF

A. L. Wissburg,
San Bernardino, California.

Wright & McKee,
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San Diego, California,
Attorneys for Appellant.

FILED
AUG 1? 1932
PAUL P. O'BRIEN

SHOPPING NEWS PRINTING CO., SAN DIEGO, CALIFORNIA

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No. 6873

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

James McCulloch, Jr.,

Appellant,

vs.

The Penn Mutual Life Insurance Company of Philadelphia, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF

Statement

This action was brought for the purpose of securing an adjudication that three policies of life insurance heretofore issued by the defendant and appellee upon the life of plaintiff and appellant were still in force and effect, and for the further purpose of recovering from defendant certain payments which by the terms of said policies were payable to the plaintiff in case of his permanent total disability. A trial was had before the Court without a jury and from a judgment rendered in favor of the defendant for costs plaintiff appeals.

The three insurance policies involved are attached to the answer as Exhibits A, B and C thereto. Exhibit A is a policy for $10,000.00 which was issued October 14, 1925, and appears at pages 48 to 76 of the Transcript. Exhibit B is a policy for $15,000.00 issued November 27, 1925, and appears at pages 77 to 105 of the Transcript. Exhibit C is a policy for $5,000.00 issued November 27, 1925, and appears at pages 106 to 133 of the Transcript.

By the terms of Exhibit A the company agreed to pay a monthly income of $100.00 and waived the payment of subsequent premiums in case the insured became totally and permanently disabled (T. 49). The total annual premium provided for by this policy was $275.60, in which amount there was included a premium of $21.70 for the total and permanent disability benefits (T. 50).

Exhibit B is identical in form and in all particulars except as to amounts. The policy provides for a monthly income of $150.00 and waiver of subsequent premiums in case of total permanent disability (T. 78). Total annual premium provided for in this policy was $413.40, which included a premium of $32.55 for disability benefits. (T. 79.)

The third policy, Exhibit C, for $5,000.00 does not provide for a monthly income in case of disability but provides merely for the waiver of subsequent premiums in case of total permanent disability (T. 107). By its terms an annual premium of $122.50 is provided for which includes a premium of $1.80 for disability benefits (T. 108).

The execution and delivery of these policies is admitted by the answer. It will be necessary in subsequent portions of the brief to analyze in detail the facts surrounding the payment of premiums. It was contended by the plaintiff

that he became totally and permanently disabled about the 31st day of July, 1926, at which time we believe it is beyond controversy that the policies were in full force and effect. We believe that an analysis of the evidence will demonstrate beyond controversy that all three of the policies were in effect up to and including the 18th day of March, 1927, by virtue of payment of premiums made by plaintiff to defendant. Whether these policies continued to be binding and effective by reason of the operation of the disability provisions therein contained is one of the issues to be determined herein.

At the time of the issuance of the $10,000.00 policy, Exhibit A, plaintiff executed and delivered to defendant his note for the premium in the amount of $275.60 (T. 167). It is undisputed in this action that this note was paid, so that it is beyond controversy that the $10,000.00 policy was in force for the first year and the grace period therein provided or at least until November 14, 1926.

In payment of the premiums on the other two policies plaintiff gave to defendant a note for $551.20, dated November 25, 1925. This note was due March 26, 1926 (T. 166). The note was not paid when due but by reason of subsequent transactions between plaintiff and defendant and the giving and paying of a subsequent note we believe that we can demonstrate to the satisfaction of the Court that these policies were in effect, as heretofore stated, until March 18, 1927.

The plaintiff was taken sick on July 31, 1926. He called in Dr. Chester O. Tanner, of San Diego, as his physician. At that time he was confined in bed until about the middle of September (T. 166). Dr. Tanner called into consulta-

tion Dr. W. M. Alberty and Dr. Lyle C. Kinney, of San Diego. Dr. Kinney is a specialist in X-ray diagnosis and took X-ray plates of plaintiff's chest. As a result of examinations and the X-ray diagnosis it was determined at that time that Mr. McCulloch was suffering from tuberculosis and had at the time tubercular pneumonia. The X-ray plates showed "tuberculosis throughout both lungs with fluid at the base of the right lung." (T. 181.) Although the nature of plaintiff's illness was determined at the time, the doctors did not tell Mr. McCulloch of the nature of his illness. He was given to understand that he was suffering from pneumonia and pleurisy with effusions, and it was not until July, 1927, that he learned of the nature of his illness (T. 166, 169 and 170).

At the time the plaintiff was taken ill he was engaged in business as manager of a hospital in San Diego, although he was not a physician or surgeon (T. 176). The evidence is undisputed that plaintiff remained in bed until some time in September, 1926, and was confined to his house until about the first part of November of that year (T. 176). During the balance of the year he was in a very weak condition but made a few short trips to his hospital in an attempt to keep in touch with his business. He testified that he went to the hospital once or twice in November, eight or ten times in December and about the same number of times in January (T. 179, 180). He was unable to look after his business and has been unable to transact any business since July, 1926. His business went from bad to worse and failed and was placed in bankruptcy in March, 1927 (T. 166, 180). Plaintiff's testimony with respect to his illness and disability was corroborated in every respect

by the testimony of his wife, Mrs. Anna R. McCulloch. During the early part of 1927 plaintiff was not confined to his bed, but with the exception of short trips of an hour or so to the hospital he was confined to his home. In April, 1927, he was again confined to his bed, where he stayed for about a month (T. 214). Mrs. McCulloch learned in August, 1926, that the plaintiff was suffering from tuberculosis but did not tell him the nature of his illness and corroborates his statement that no one else told him (T. 213). During this period of time Mrs. McCulloch knew nothing about the insurance policies in question (T. 214). As a result she did not appreciate the necessity of conveying this information to her husband in so far as it affected the insurance policies.

Referring again to the $10,000.00 policy, the note given in payment of the first year's premium was paid in part on December 12, 1925, and the balance due was paid on September 10, 1926 (T. 165). In November, 1926, a note was given by the plaintiff for the second year's premium on the $10,000.00 policy (T. 167). After being confined by his illness, with the resultant failure of his business, Mr. McCulloch was unable to pay this note when due. However this policy did not enter into the subsequent transaction, between him and the agent for the company, in February, 1927, at which time Mr. McCulloch was endeavoring to keep his insurance under policies No. 1196774 and No. 1196773 (Exhibits B and C) in force. A postdated check for $300.00 and an additional note was given by him to the agent (T. 167), but he was unable to deposit available funds to meet the check. The check was placed in the hands of the District Attorney and prosecution was threatened. As a final result Mr. McCulloch surrendered the policies to the

agent for the defendant and a note for $339.39, dated April 19, 1927, payable to defendant's agent, was executed. (T. 169.) This note, as we will endeavor to show, covered the term insurance and disability premiums up to and including March 18, 1927.

Plaintiff was unable to do any work during the early part of 1927, although at that time he believed that he had recovered from his illness and would eventually regain his health. However, in April, 1927, he was again confined to his bed. The first direct information to the plaintiff that he was suffering from tuberculosis was from Dr. Pasche of San Diego on July 6, 1927, when plaintiff made application to the Veterans' Bureau for hospitalization (T. 169). Shortly thereafter plaintiff made application to the Metropolitan and to the Acacia Insurance Companies, in which companies he carried other insurance, for allowance of disability benefits as provided in those policies. The application to the Metropolitan Life Isurance Company appears at pages 195 to 203 of the Transcript, and that to the Acacia Mutual Life Association at pages 204 to 211. In both of these applications the plaintiff's disability was stated to have commenced in April, 1927, when he was again confined to his bed.

The evidence, as we will more fully point out, amply establishes that from July, 1926, when plaintiff was first stricken, up to and including the time of trial, plaintiff was totally disabled by reason of tuberculosis, with little, if any, indication that he would ever recover. Although his application for disability benefits by the other two insurance companies were allowed in 1927, plaintiff made no effort to collect from the defendant or to enforce his rights arising

from the disability provisions contained in the policies sued upon until 1929, at which time demand was made upon him for the payment of the note for $339.39 to which reference has been made. Plaintiff's response to the demand was that he failed to see why he should be compelled to pay for this insurance from which he got no benefit whatever. Upon being informed that the company claimed that he had received the benefit of this insurance, he asked for copies of the three policies and upon receipt of them made demand for his disability benefits, which demand was refused (T. 170). In the face of this situation defendant's agent compelled the plaintiff to pay the note (T. 169, 175). As a result of these transactions plaintiff commenced action upon the policies.

Plaintiff's contention has been throughout that he became totally and permanently disabled, as those terms are used in the insurance policies, during the last part of July, 1926, at a time when all three policies were in force, and that by the terms of the policies the defendant company agreed to waive all future premiums and to pay him additional sums aggregating $250.00 per month upon the two policies for $10,000.00 and $15,000.00. Appellant contends further that he had no knowledge of the nature of the disease from which he was suffering or of the fact that his disability was permanent in character until July, 1927, and that the transactions in the early part of 1927 in which the policies were surrendered were without consideration and were entered into under a misapprehension and mistake of fact. He contends further that he should be relieved from his failure to notify the company of the existence of his permanent disability by reason of the fact that he was in ignorance of the character of his illness and therefore it was impossible for

him to give such notice, and that his delay in making claim for the disability has involved no detriment to the company and is excusable because he had no copies of the insurance policies and believed that the entire subject had been dropped and that he had no protection by reason of the issuance of the policies until he learned that the agent for the company was insisting upon his payment therefor.

The case was tried by the Court without a jury and judgment rendered in favor of the defendant for costs. The findings of the trial Court are throughout adverse to plaintiff's contentions. The entire decision, however, may be said to center around the finding of the trial Court to the effect that plaintiff was not permanently disabled in 1926, during the time the policies were admittedly in force, but that such disability dated from April 9, 1927, when plaintiff was again confined to his bed. Plaintiff contends that this finding is contrary to the undisputed evidence and finds support in no substantial evidence offered by the defendant. We contend further that other adverse findings, predicated as they are upon the finding just mentioned, necessarily fall with it. We believe that we can demonstrate to the satisfaction of the Court that the law amply supports the position of the plaintiff that he is entitled to a recovery and to a new trial of this cause upon showing that his disability arose in 1926 and has existed continuously thereafter.

POINTS AND AUTHORITIES

I

The Three Policies Sued Upon were in Full Force and Effect in July and August, 1926, at the Time the Plaintiff Became Disabled.

II

The Facts Proven at the Trial Establish that the Plaintiff Became Totally and Permanently Disabled During the Time the Policies were in Force.

7 Couch on Insurance, 5783.

American Liability Company v. Bowman, 65 Ind. App. 109, 114 N. E. 992.

Turner v. Fidelity and Casualty Company, 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529.

Lobdill v. Laboring Men's Mutual Aid Association, 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537.

James v. United States Casualty Company, 113 Mo. App. 622, 88 S. W. 125.

Hagman v. Equitable Life Assurance Society, 282 S. W. 1112, 214 Ky. 56.

Mutual Benefit Association v. Nancarrow, 71 Pac. 423, 18 Colo. App. 274.

Pacific Mutual Life Insurance Company v. Branham, 70 N. E. 174, 34 Ind. App. 243.

North American Accident Insurance Company v. Miller (Tex.), 193 S. W. 750.

United States Casualty Company v. Perryman, 82 So. 462, 203 Ala. 212.

Great Eastern Casualty Company v. Robins, 164 S. W. 750, 111 Ark. 607.

Fidelity and Casualty Company of New York v. Logan, 229 S. W. 104, 191 Ky. 92.

Taylor v. Southern States Life Insurance Company, 106 S. C. 356, 91 S. E. 326, L. R. A. 1917 C 910.

Jones v. Fidelity and Casualty Company of New York, 207 N. W. 179, 166 Minn. 100.

Metropolitan Life Insurance Company v. Bovello, 12 Fed. (2d) 810, 56 App. D. C. 275, 51 A. L. R. 1040.

Jacobs v. Loyal Protective Insurance Company, 124 Atl. 848, 97 Vt. 516.

Heralds of Liberty v. Jones, 142 Miss. 735, 107 So. 519.

III

The Requirement that Insured Give Notice of Disability Before a Default in Premium is Excused by Insured's Ignorance of the Permanence of His Disability.

Wick v. Western Union Life Insurance Company, 104 Wash. 129, 175 Pac. 953.

Minnesota Mutual Life Insurance Company v. Marshall (C. C. A. 8), 29 Fed. (2d) 977.

Stipcich v. Metropolitan Life Insurance Co., 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895.

McMaster v. New York Life Ins. Co., 183 U. S. 25, 22 S. Ct. 10, 46 L. Ed. 64.

Bergholm v. Peoria Life Insurance Company, 76 L. Ed. 306.

Southern Life Insurance Company v. Hazard, 148 Ky. 465, 146 S. W. 1107.

Merchants' Life Insurance Company v. Clark (Tex. Civ. App.), 256 S. W. 969.

Missouri State Life Insurance Company v. Le Fevre (Tex. Civ. App.) 10 S. W. (2d) 267.

Meropolitan Life Insurance Company v. Carroll (Ky.), 273 S. W. 54.

Fidelity Mutual Life Insurance Company v. Gardner's Administrator, 233 Ky. 88, 25 S. W. (2d) 69.

Bank of Commerce and Trust Company v. North-

western National Life Insurance Company (Tenn.) 26 S. W. (2d) 135.

Mid-Continent Life Insurance Company v. Hubbard (Tex.), 32 S. W. (2d) 701.

Intersouthern Life Insurance Company v. Hughes' Committee, 6 S. W. (2d) 447, 224 Ky. 405.

Levan v. Metropolitan Life Insurance Company, 138 S. C. 253, 136 S. E. 304.

McColgan v. New York Life Insurance Company, 36 Ohio App. 123, 172 N. E. 849.

State Life Insurance Company v. Fann (Tex.), 269 S. W. 1111.

Hagman v. Equitable Life Assurance Society, 214 Ky. 56, 282 S. W. 1112.

Aetna Life Insurance Company v. Palmer, 159 Ga. 371, 125 S. E. 829.

Hawthorne v. Travelers' Protective Association, 112 Kan. 356, 210 Pac. 1086, 29 A. L. R. 494.

Newman v. John Hancock Mutual Life Insurance Company, 216 Mo. App. 180, 7 S. W. (2nd) 1015.

Inter-Southern Life Insurance Company v. Duff, 184 Ky. 227, 211 S. W. 738.

Security Life Insurance Company v. Gottman (Ind. App.), 156 N. E. 173.

Spencer v. Security Benefit Association (Mo. App.), 297 S. W. 989.

Frommelt v. Travelers' Insurance Company, 150 Minn. 66, 184 N. W. 565.

Shafer v. United States Casualty Company, 156 Pac. 861, 90 Wash. 687.

Houseman v. Home Insurance Company, 88 S. E. 1048, 78 W. Va. 203, L. R. A. 1917-A 299.

IV

The Attempted Cancellation and Surrender of the Policies was Ineffectual.

Argument

At the outset permit us to make our contentions plain. We believe that the record demonstrates that the three insurance policies sued upon were in full force and effect during 1926. If plaintiff became totally and permanently disabled during that period, the liability of the defendant arose under the disability provisions contained in the policies. Plaintiff's disability was one of the risks insured against and if this risk occurred at a time when the policies were admittedly in force, there was no consideration whatever for the surrender of the policies and such surrender was made under a misapprehension of existing facts. If, on the other hand, plaintiff's disability did not arise until April, 1927, after the policies had been surrendered, then defendant would not be liable, as the liability under the disability provisions would attach only in case the insurance was then in force.

It is only fair, therefore, that we concede at the outset that if the plaintiff was not totally and permanently disabled in 1926, as shown by the evidence offered on his behalf, he cannot recover. We must concede, of course, the full force of the rule that findings of fact of the lower Court, if based upon conflicting evidence, will not be disturbed upon appeal, even though the Appellate Court might feel that it would have made a different decision had it passed upon the issue of fact in the first instance. But it is equally well settled that before an Appellate Court will sustain a finding of fact attacked as contrary to the evidence upon the theory that it

is based upon a conflict of testimony, there must be a substantial conflict. There must be evidence of a substantial nature in support of the finding so made. It is obvious that unless we can demonstrate that there is no substantial conflict in the evidence for the Court's finding that plaintiff did not become totally and permanently disabled until April, 1927, then the judgment must be affirmed. If, on the contrary, we are able to demonstrate to the satisfaction of the Court that there is no substantial dispute or conflict in the testimony, and that plaintiff's evidence demonstrates beyond controversy that he was disabled in 1926, as claimed, then it follows that the judgment must be reversed, as the entire fabric of the Court's findings is built around the proposition that plaintiff failed to establish his disability as of the alleged date and at a time when the insurance was in effect.

There is ample authority for the proposition that the provisions of insurance policies requiring the giving of notice of such disability are not effective to defeat the liability to pay upon the happening of the risk insured against, where by reason of ignorance of the facts, it is impossible for the insured to give such notice. It follows therefrom that the failure to give notice at the time of the happening of the disability must necessarily be excused, and that the purported cancellation and surrender of the policies became ineffective by reason of mistake of fact and failure of consideration.

I

The Three Policies Sued Upon were in Full Force and Effect in July and August, 1926, at the Time the Plaintiff Became Disabled.

Inasmuch as there was some considerable controversy at the trial as to the length of time plaintiff was insured by these three policies, it is of considerable importance that this feature of the case be set at rest at the outset. It is of small importance, perhaps, to determine the exact day upon which the insurance terminated unless extended by the disability provisions. We are perfectly willing to concede that unless the insurance was so extended, it ceased to become effective after March 18, 1927, and before plaintiff was again confined to his bed. Considerable testimony was introduced relative to the purported surrender of these policies, but the uncertainty in this regard is of relatively little importance when it is once established that the insurance was actually effective at the time plaintiff's disability arose.

Little need be said relative to the policy for $10,000.00, copy of which is attached to the answer as Exhibit A. As heretofore pointed out, at the time this policy was taken out, a note for $275.60 was given by plaintiff to defendant. This note was paid in instalments, $150.00 being paid in December, 1925, and the balance paid by check dated September 10, 1926 (T. 165). It may be taken as beyond controversy, therefore, that this policy was in effect at least the first year, plus the additional period of grace, or until November 14, 1925.

Considerable uncertainty arose, however, as to the other two policies, both of which were issued as of November 27, 1925. A note for $551.20 was given by plaintiff to defendant in payment of the first year's premium for these two policies. It was not paid when due but was extended over a period of time. The first year of the three policies, including the grace period, elapsed. Various notes were

given for the second year's premiums on the same policies. On December 30, 1926, plaintiff signed note surrender policies, purporting to surrender the $15,000.00 and $5,000.00 policies in return for the cancelation of his notes, which instruments appear at pages 188 and 189 of the Transcript. It became apparent, however, that in so far as these instruments purport to recite a mutual release between the company and the plaintiff, they are entirely misleading and incorrect in that there was no release of liability to the plaintiff, nor any intention to so release him. On the contrary, the entire gist of the transaction was a cancelation of the various policies, but in such transaction plaintiff was charged for insurance up to and including March 18, 1927. An instrument in similar form was on March 18, 1927, executed with reference to the $10,000.00 policy (T. 187). In February, 1927, in an effort to reinstate his insurance and continue it in force, plaintiff executed and delivered a postdated check payable to the order of C. L. Randolph and Son, agents for the defendant. Failing to meet this check, it was delivered over to the District Attorney's office and the plaintiff was threatened with prosecution (T. 168). Plaintiff's contention that he was summoned to the District Attorney's office and confronted with the check is corroborated by the testimony of John D. Cornell, County Detective attached to the District Attorney's office, who was called on behalf of defendant (T. 223, 224). A letter sent to Mr. McCulloch in March, 1927, contains a direct threat of prosecution (T. 224). As a result of this situation all of the policies were taken up, surrendered as of date of March 18, 1927, and note for $339.39, payable to Mr. Don C. Carrell, one of the company's agents, was executed. This

note was dated April 19, 1927, and was for sixty days (T. 169).

At the time of the trial plaintiff was uncertain as to the manner in which the amount in question was determined. Mr. Charles L. Randolph, one of the company's agents, made some attempt to explain the amount of the note, but his testimony was equally indefinite (T. 226, 227). He attempted to claim that of this amount $233.40 was for term insurance and that the balance was for some personal obligation, the nature of which he did not know, being a transaction between Carrell and the plaintiff (T. 228). Fortunately, however, by simple arithmetical computation the matter can be readily explained. Mr. Randolph in his testimony recited:

> "The term charge was charged back to the agent. The term charge is the actual charge for insurance for death only. It provides no other, no commission. No waiver of premium for disability or commission." (T. 227.)

It was the insistence of Mr. Randolph that the amount charged in this note contained no charge for disability benefits that created a situation of some uncertainty. Mr. Randolph was unable to tell what the term charge was and seemed utterly at a loss to explain the figures. It is unnecessary to go out of the record for a conclusive explanation, however, for the terms of the policies themselves make the situation entirely clear. The plaintiff contends that at the time of the execution of this note the gist of the transaction was the surrender of the policies and that he was charged for insurance under all of them up until the time of their surrender March 18, 1927.

Turning to the terms of the policies themselves, particular attention is called to Section 3, which is the same in all policies. By way of illustration we take that from the $10,000.00 policy, Exhibit A, appearing at pages 54 and 55 of the Transcript. This section deals with policy values and "non-forfeiture in event of lapse." Three options are provided for and reference is made to the loan or cash surrender values of the policies and an option given for a term of automatically extended insurance without participation. In substance, it is provided that at the end of the third year the policy shall have a loan or cash surrender value of $35.17 per thousand, or a value of $351.70 for the $10,000.00 policy. Option No. 2 provides for the purchase of paid up *life insurance* (T. 54). Under the disability provisions of the policy it is provided that these benefits shall terminate "if this policy be surrendered for its cash value, or if any paid-up or extended insurance provided for in Section 3 of this policy becomes effective." (T. 58.) It therefore becomes apparent that the figures given in the table in Section 3 of the policy refer only to the life insurance feature of the policy and not to the disability provisions, and that therefore the amount of extended insurance provided for therein has reference to life insurance alone, not coupled with any permanent disability provision.

It makes no difference how the company arrives at the amount of $35.17 as the loan or cash surrender value per thousand, as that is a matter of contract and includes the amount of cash reserve set aside on each policy. It is to be noted, however, that the same amount per thousand is provided in each policy. If the policy has been kept in force for three years, it has a loan or cash surrender value of this fixed amount. It is provided, however, that instead of

taking the cash surrender value, the assured is given the option of permitting such amount to be applied to the purchase of a term of automatically extended insurance without participation for a period of four years and seventy-two days. It is common knowledge that this provision is nothing more than a recital of the fact that $35.17 is the net cost per thousand of term insurance for the period mentioned. If, therefore, $35.17 will purchase $1,000.00 of term insurance for four years and seventy-two days, it is a matter of simple arithmetical computation to figure the term rate of such insurance. The time provided is equivalent to 1,532 days, which divided into $35.17 gives an amount of $.022956 per day, or a term rate of $8.38 per thousand per year. This would make a term rate of $125.70 per year on the $15,000.00 policy and $41.90 on the $5,000.00 policy. From November 27, 1926, the last day of the first year's term of these policies, is 112 days, which at the term rate would call for $39.00 on the $15,000.00 policy and for $13.00 on the $5,000.00 policy. From October 14, 1926, to March 18, 1927, is 156 days. The first year's term on the $10,000.00 policy expired on October 14, 1926, and prorating the term insurance upon that policy for the period mentioned would call for $35.80.

As pointed out heretofore, no term rate is provided for the disability benefits. By the terms of the $15,000.00 policy it is provided that the disability double indemnity and waiver of premium shall be paid for at the rate of $51.30 per year. In the $10,000.00 policy the premium for such benefits is $34.20 per year. The premium for the disability benefits in the $5,000.00 policy, which does not include the payment of monthly benefit, is $1.80 per year. There being no provision for term insurance for these benefits upon a

surrender of the policy, these benefits would be prorated. Based upon the computations made in the manner just mentioned, we produce the following table of calculations:

POLICY NUMBER 1196774 for $15,000.00

Net term life insurance for one year at $8.38 per thousand ending November 27th, 1926	$125.70	
Disability, double indemnity and waiver of premium one year ending November 27th, 1926	51.30	
Net term life insurance for 112 days from November 27th, 1926, to March 18th, 1927, inclusive, at $8.38 per thousand per year	39.00	
Disability, double indemnity and waiver of premium 112 days from November 27th, 1926, to March 18th, 1927, inclusive, at $51.30 per annum	15.73	$231.73

POLICY NUMBER 1196773 for $5,000.00

Net term life insurance for one year at $8.38 per thousand ending November 27th, 1926	$ 41.90	
Disability, waiver of premium benefits one year ending November 27, 1926	1.80	
Net term life insurance for 112 days from November 27th, 1926 to March 18th, 1927, inclusive, at $8.38 per thousand per annum	13.00	
Disability waiver of premium benefits for 112 days from November 27th, 1926, to March 18th, 1927, at $1.80 per annum	.56	$ 57.26

POLICY NUMBER 1191014 FOR $10,000.00

Net term life insurance for 156 days from October 14th, 1926, to March 18th, 1927, inclusive, at $8.38 per thousand per annum	$ 35.80	
Disability, double indemnity and waiver of premium 112 days from October 14th, 1926, to March 18th, 1927, inclusive, at $34.20 per annum....................	14.60	$ 50.40
Total		$339.39

Obviously, therefore, there can be little doubt of what went into the note for $339.39. It is interesting to note that apparently the theory was that upon the surrender of these policies, the term rate should be applied to the insurance. However, there was no attempt to apply the term rate to the $10,000.00 policy, the first year's premium upon which had been fully paid to the company. Had the three policies been treated in the same manner, Mr. McCulloch would have been entitled to a large credit upon this amount by reason of paying the full premium for the first year on the $10,000.00 policy. In any event, it is obvious that the intention of the parties was that he should pay for the insurance protection supposed to have been accorded to him upon the three policies up to and including March 18, 1927.

There need be no uncertainty in the minds of the Court by reason of the fact that Mr. McCulloch was not charged the full premium on the other two policies for this period of time. It is common knowledge that term insurance may always be bought at a much cheaper rate than insurance which can be renewed by the yearly payment of premium

throughout the life of the insured. If a man is twenty-five years old and takes out a policy which he can maintain throughout his life, an average premium is determined which is much more than the rate which would be charged for a limited period of an insured of that age, as the figures are based upon his expectancy of life. Where, however, a company undertakes to insure only for a limited term and obviates the necessity of presuming that the insurance will cover the insured throughout his life, a much cheaper rate can properly be charged. Here, therefore, when the parties undertook to surrender the policies and terminate the company's liability, there was no necessity of charging more than the term rate for life insurance. We submit that this calculation demonstrates to a mathematical certainty that the insurance was considered by the contracts of the parties as being in effect, including all disability benefits, to and including March 18, 1927. As a matter of fact, the exact date is of small moment except for the purpose of demonstrating that these three policies of insurance, coupled with all disability benefits, were effective and in full force at the time of plaintiff's alleged disability. It is interesting to note that Mr. Carrell, the agent, exacted the execution of this note from the plaintiff upon the theory that the amount named had been paid to the company and plaintiff was compelled to pay the note. The defendant having been paid for this insurance, it should be required to respond in case it be shown that one of the risks insured against occurred during the life of the policy.

II

The Facts Proven at the Trial Establish that the Plaintiff Became Totally and Permanently Disabled During the Time the Policies were in Force.

It is the appellant's position that the undisputed evidence established that he became totally and permanently disabled on the last day of July, 1926. It is true that the Court has found that such disability did not arise until April, 1927. In presenting this feature of the case we are entirely mindful of the rule that the Appellate Court will not disturb the findings of fact of the lower Court, based upon a conflict of evidence. It is also the rule, however, that there is no conflict of evidence where the evidence in support of the Court's finding is not of a substantial nature. There must be a real conflict in the testimony before the presumptions in favor of the trial Court's findings apply. Where, as here, the evidence clearly establishes the existence of the disability, a contrary finding, unsupported by any substantial evidence, is ineffectual.

It is beyond dispute that McCulloch was taken seriously ill on the last of July, 1926; that Dr. Tanner and Dr. Alberty were called; that Dr. Lyle C. Kinney was called in his expert capacity to make X-ray diagnosis; and that these three doctors concurred in the diagonsis that the plaintiff was suffering from pulmonary tuberculosis. It remains undisputed that McCulloch was confined to his bed until the middle of September, 1926; that he has never recovered from the disease, has never been able to work since and upon frequent occasions since that time he has been again confined to his bed. The fact that McCulloch today and at the time of the trial was totally disabled from following a gainful occupation is beyond controversy. The testimony of Dr. Tanner is positive to the effect that the appellant was suffering from tuberculosis, but that he did not tell McCulloch of that fact (T. 181). Dr. Alberty testified positively that McCulloch was suffering from tuberculosis in August,

1926; that he was totally disabled and had been totally disabled ever since that time (T. 183). The Doctor further testifies that McCulloch at the time of the trial was still disabled, but that McCulloch was not told the nature of his disability in 1926 (T. 184). Dr. Lyle C. Kinney, who made the X-ray examination, diagnosed appellant's ailment as fibroid tuberculosis (T. 215). He states that the plaintiff was totally disabled with the disease (T. 216). His express findings to that effect are set forth on page 217 of the Transcript. This evidence is completely corroborated by the testimony of Mrs. McCulloch, who describes in detail the plaintiff's condition (T. 213, 214), and who testifies that she knew nothing concerning the policies, and that Mr. McCulloch was not advised as to the nature of his disability until July 6th, 1927 (T. 215).

In so far as it was possible, therefore, the plaintiff presented to the Court positive, expert testimony supported by scientific diagnosis. This evidence remains undisputed. No testimony was offered, disputing the diagnosis of these physicians, nor disputing the facts relative to the plaintiff's condition. Let us view, therefore, those things introduced on behalf of the defendant upon which the trial Court predicated his finding that the plaintiff was not disabled in 1926.

It appears that in the early part of 1927, as heretofore pointed out, the plaintiff, still ignorant of the nature of his physical disability and still believing that his illness was pleurisy, was attempting to keep these policies in force and to bring about their reinstatement. In that connection he gave to the agents of the defendant an application for reinstatement of the $5,000 and $15,000 policies, appearing at page 191 of the Transcript. In this application the following statements were made:

> "Are you in good health? Yes."
> (T. 192.)

And also:

> "Lobar pneumonia, July, 1926—
> 2 mo. disability, complete recovery.
> No complications. Dr. C. O. Tanner,
> 1st Natl. Bank Bldg., San Diego, Calif."

At that time he was examined by Dr. Herbert S. Anderton, who testified that he thought the plaintiff had completely recovered from his former illness and that he made no clinical findings of tuberculosis (T. 218). Dr. Anderton's testimony, however, failed utterly to withstand the test of cross-examination. He testified that although he saw no indication of active tuberculosis, he had no X-ray findings or other proper examination to determine this question (T. 219). He also testified that the examination given the plaintiff at that time was an ordinary life insurance examination, no other examination being made (T. 220). In response to questions asked by the Court Dr. Anderton admitted, after examining the X-ray plates taken of the plaintiff in August, 1926, that there was no essential difference between his reading of the X-ray plates and that of Dr. Kinney, who testified on behalf of the plaintiff (T. 222). In the face of these admissions made by Dr. Anderton upon cross-examination, his testimony amounts to nothing and furnishes no substantial dispute or contradiction of the evidence offered on behalf of the plaintiff.

The defendant called Mrs. Louise Barnett, who had been a nurse in the hospital owned by McCulloch, apparently in an endeavor to prove that in the early part of 1927 the plain-

tiff was conducting his business. However, the witness refused to so testify, stating in substance that the plaintiff appeared at the hospital on occasion and stayed there only for short periods of time (T. 225).

We submit that the statements contained in the application for reinstatement of the policies, to which reference has been made, furnish no substantial evidence whatever. When examined concerning this application, the plaintiff stated in substance that at the time it was made he did not know the nature of his illness, he thought he had been suffering from pleurisy and thought that he was on the road to recovery. He believed that he was in a convalescent state and stated that when the examination was made he thought he was in good health (T. 190). It must be recollected that although plaintiff was operating the hospital and was manager of the business, he was not a physician or surgeon (T. 176). He had no more expert knowledge to apply to his condition than any other layman. For reasons best known to his wife and the doctors, the true nature of his illness had not been reported to him. It is common knowledge that people suffering from this dread disease are prone to take a very optimistic view of their condition and apparently have little or no realization of the gravity of the ailment. There is not a syllable of testimony to indicate that McCulloch actually knew that he was affected with tuberculosis. His statement to Dr. Anderton, the insurance examiner, therefore, does no more than corroborate plaintiff's contention that he was then ignorant of the fact that the disability from which he was suffering was total and permanent. Such statement or admission proves nothing further.

It is only fair that in considering this feature of the case the Court take into consideration the entire surrounding circumstances. As we have pointed out, McCulloch, by reason of his illness, was unable to attend to his business. It is undisputed that he was pressed financially and was having extreme difficulty in meeting his obligations. He was making every effort to keep his insurance alive. His hospital business was finally terminated by an adjudication in bankruptcy. Yet during the time that he was confined to his bed, desperately ill with tuberculosis, he had in his hands these three insurance policies, by the express terms of which all future premiums were waived in case of his disability. They also contained the provision requiring the company to pay to McCulloch the monthly income of $250.00 upon furnishing proof of disability. Can the Court conceive of any possible reason for plaintiff's failure to make this claim at that time except the one obvious reason that he did not know the nature of the disability from which he was suffering?

It has been frequently held that the disability contemplated by contractual provisions of this nature is such disability as prevents the insured from following his ordinary business or gainful occupation. It is not contemplated by the parties that the disability must be so extensive that a man can move neither hand nor foot, for it is seldom that one is so completely disabled. The phrase is construed in its popular sense as meaning such disability as prevents the insured from earning his livelihood as he has theretofore done.

The general rule is laid down in 7 *Couch on Insurance*, 5783, as follows:

"As to the test for determination of what constitutes total permanent disability, it has been said that, since every case must depend upon its own facts, there can be formulated no general rule more definite than that relativity and circumstances control; and that every insured's rights depend upon the consequences of his own impairment and disability, and not upon whether his capacity be less or more than that of the average man. A good-faith, though ineffectual, effort to perform the duties of one's usual employment does not preclude a finding of total and continuous disability preventing the performance of every duty pertaining to such employment, even though the insured succeeded in properly performing a part of his former duties, if he might reasonably have refrained from doing any work. And one afflicted with 'Buerger's disease,' or 'thrombo augititis obliteraus,' a progressive and incurable disease of the veins and arteries which leads to closure of the arteries of the extremities to such an extent that the sufferer requires constant care and about eight hours' treatment daily, is 'totally and permanently disabled,' although he could, with some discomfort and possible danger, follow some occupations for a few hours a day."

An interesting case is *American Liability Company v. Bowman,* 65 Ind. App. 109, 114 N. E. 992. The policy provided that insured should receive a monthly payment for the period "that the assured is totally and continuously from the date of accident disabled and prevented from performing every duty pertaining to any business or occupation." It appeared that after an injury received for a period of something more than a month the insured actually went to his

office daily and for such period actually performed a part of his duties, although with considerable pain and discomfort. A finding that he was totally disabled, within the meaning of the policy, during all of such time was upheld by the Court. The Court said:

> "Where a party is shown to be in fact totally disabled for the entire period for which compensation is sought, it cannot be held as a matter of law that he was not disabled because during a portion of such time he made a good faith, though ineffectual, effort to perform the duties of his usual employment." (Page 995.)

Two interesting cases are reported in Vol. 38 L. R. A.; *Turner v. Fidelity and Casualty Company,* 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, and *Lobdill v. Laboring Men's Mutual Aid Association,* 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537. In the first case it was held that the fact that a man goes to his office every day for a short time, without doing any work or business there, does not show that he is not wholly disabled from prosecuting any and every kind of business pertaining to his occupation. A similar rule was laid down in the second case, in which it was held that total disability does not mean absolute physical inability to transact any kind of business, and that ability to occasionally perform some trivial or unimportant act connected with some kind of business pertaining to the assured's occupation did not render his disability partial instead of total, provided he was unable to substantially or to some material extent transact any kind of business pertaining to such occupation.

In *James v. United States Casualty Company,* 113 Mo. App. 622, 88 S. W. 125, the assured was a merchant. After

receipt of an injury by falling from a street car, he spent several days in bed and thereafter went to his place of business almost daily, where he signed checks, approved orders for goods and dictated letters. However, he could not do many of the principal duties pertaining to his business. A finding that he was totally disabled was upheld.. It was contended that before a man could be held to be totally disabled, he must be in condition where he could not perform any part of any of the duties of his business. The Court said:

> "It cannot be that the parties intended that before an assured could recover on the policy he should lie the full period of his injury in a state of coma. To interpret the clause in its contractual sense, as defendant seeks to have us do, would render the contract utterly useless to an assured, and would have been nothing short, practically speaking, of collecting a premium without rendering a consideration."

In *Hagman v. Equitable Life Assurance Society*, 282 S. W. 1112, 214 Ky. 56, the Court held that the plaintiff was physically incapacitated, within the meaning of a life insurance policy containing provisions very similar to those involved in the case at bar, during the period he was suffering from a broken leg, although in the meantime his wife drove him to the office in an automobile, where he was able to sit at a desk and, although suffering intensely, could answer the telephone and direct, to a certain extent, his business.

In *Mutual Benefit Association v. Nancarrow*, 71 Pac. 423, 18 Colo. App. 274, it was held that:

> "The words 'totally disabled' as used in an accident policy, do not mean a state of absolute helplessness.

> The insured might be able to walk, might be able to ride on the cars to his physician's office, and still have been entirely incapacitated for work or business. If he is so incapacitated, we think he is totally disabled, within the meaning of the policy."

A similar ruling was laid down in *Pacific Mutual Life Insurance Company v. Branham,* 70 N. E. 174, 34 Ind. App. 243, in which it was held that it was sufficient to prove that the injury wholly disabled the assured from doing of all substantial and material acts necessary to be done in the prosecution of his business, or that his injuries were of such a character and degree that common care and prudence required him to desist from his labors so long as was necessary to effect a speedy cure.

In *North American Accident Insurance Company v. Miller* (Tex.), 193 S. W. 750, it was held that total disability consisted of such disability as would require the insured to desist from the transaction of his business, in the exercise of ordinary care in the preservation of his life and health.

In *United States Casualty Company v. Perryman,* 82 So. 462, 203 Ala. 212, it was held that total disability might exist under a policy defining the same as inability "to perform any and every business duty or occupation," although it was physically possible for insured to perform occasional acts as part of his employment or business, it being unnecessary that insured be confined to his room, home or hospital for the entire period for which he claims total disability.

In *Great Eastern Casualty Company v. Robins,* 164 S. W. 750, 111 Ark., 607, the insured was held to be totally dis-

abled, though he was able to go to his office a few times to give instructions to his foreman.

In *Fidelity and Casualty Company of New York v. Logan,* 229 S. W. 104, 191 Ky. 92, the assured was a lawyer, who devoted much of his time to caring for timber and mining interests. After his injury he could do only about one-third of his usual work and the evidence showed that care and prudence required him to desist from transacting any business. It was held by the Court that he was totally disabled.

Disease rendering a man unfit to carry on a gainful occupation was held to constitute total disability in *Taylor v. Southern States Life Insurance Company,* 106 S. C. 356, 91 S. E. 326, L. R. A. 1917C 910.

It has been repeatedly held that in order to establish total disability it is unnecessary to prove absolute physical disability.

> *Jones v. Fidelity and Casualty Company of New York*, 207 N. W. 179, 166 Minn. 100;.
> *Metropolitan Life Insurance Company v. Bovello,* 12 Fed. (2d) 810, 56 App. D. C. 275, 51 A. L. R. 1040;
> *Jacobs v. Loyal Protective Insurance Company,* 124 Atl. 848, 97 Vt. 516.

In many of the cases which we will cite in the subsequent division of our argument illness is treated as total disability, within the meaning of the provisions of policies similar to those involved in this action. It would seem as a matter of common judgment that there could be no more generally recognized total disability than an active pul-

monary tuberculosis. The few times that the plaintiff went to his office for periods of approximately an hour proved nothing more than an earnest endeavor on his part to carry on his business as best he could. The gist of his contract was an insurance against a disability depriving the plaintiff of his earning power, and we respectfully submit that the disability proven is that and more.

The further provisions of the policies are in accord with this construction, for it is provided in Section 4 that in case of a recovery from disability, the disability benefits shall cease and the company is given the privilege to require from time to time additional proof of the continuance of the disability. It is also provided in that section that "after said total disability has been continuous for not less than three consecutive months immediately preceding the receipt of due proof, such disability, if not already approved as permanent, shall nevertheless be deemed to be permanent." By such provision of the policy the company has bound itself to a construction that a so-called "permanent" disability exists by reason of illness or injury, even though a man may recover or may not be totally incapacitated for the balance of his life.

It has been held that by such a provision a disability extending for the required period raises a conclusive presumption that the man is totally permanently disabled. *Heralds of Liberty v. Jones,* 142 Miss. 735, 107 So. 519.

We respectfully submit that in accordance with the rules laid down in the foregoing authorities the plaintiff was totally and permanently disabled and that there is no substantial conflict in the evidence to support the finding of the trial Court to the contrary.

III

The Requirement that Insured Give Notice of Disability Before a Default in Premium is Excused by Insured's Ignorance of the Permanence of His Disability.

Numerous exceptions have been taken to the findings of the trial Court. It is unnecessary to discuss these findings separately and in detail. All of the Court's findings center around and are predicated upon the finding that the insured was not disabled during the period that the policies were in force. We are forced to concede that if this finding is supported by the evidence, this case is at an end, for it is obvious that the plaintiff would not be entitled to recover unless the risk insured against occurred while the policies were in good standing. When we have once established, however, as we submit we have, that the undisputed evidence establishes the total permanent disability of the plaintiff, occurring at a time when all policies were admittedly in force, the case presents an entirely different aspect. It is utterly beyond controversy that the plaintiff did not know of the nature of his disability until July, 1927, after the policies had been surrendered. It must be borne in mind that the disability benefits are not merely an incident to the insurance contracts, but for a certain definite premium the defendant has insured against the risk of total permanent disability in addition to its provision for life insurance. If, therefore, the risk insured against occurred, a liability arose. It is true, of course, that the insurer has the right to insert in its policies proper and reasonable provisions for the giving of notice of the occurrence of the risk and for the giving of such notice while the policy is in force. Such provisions, however, are obviously inserted for the sole purpose of providing that the insured act with reasonable

promptitude in giving notice of loss or occurrence of the risk in order that the insurer may make prompt investigation, but it is not the policy of the courts to permit such provisions to be so construed that they furnish to the insurer an opportunity to escape its contractual liability when the failure to give prompt notice is occasioned by facts without the control of the insured. For example, fire insurance is written upon a house. It is entirely proper that the insurer insert provisions for giving prompt notice of loss, but the giving of such notice is obviously excused when it can be shown that the insured did not know of the fire which destroyed the building. So here the plaintiff is excused from giving notice of the existence of a permanent disability when it is conclusively shown that he did not know the nature of his ailment. It is shown beyond dispute that he thought that his illness was of such nature as constituted only a temporary disability, which would not give rise to a right of recovery under the policies.

We conceive this to be the principal question of law involved in this action. Quoting from Policy A for $10,000.00, the policy reads:

> "The company agrees to pay a monthly income of $100.00 and waive payment of subsequent premiums upon receipt of due proof that the insured has become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, as provided in section four."

In Section 4 appears the following language:

> "If the insured shall become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the

company will pay to the insured a monthly income equal to one per cent. of the face amount of this policy (exclusive of any dividend additions). Said income shall start upon the date of receipt by the company at its Home Office during the insured's lifetime of due proof of total and permanent disability and continue thereafter for the period of said total disability of the insured prior to the maturity of this policy. * * * *

"The company will waive the payment of any premium falling due after receipt of due proof of total and permanent disability and during the continuance of said total disability of the insured. * * * *

"Disability shall be total and permanent if the insured is, upon the receipt of due proof, totally and permanently prevented by bodily injury or disease from engaging in any occupation whatever for remuneration or profit and became so disabled while this policy was in force by payment of premium. Immediately upon receipt of due proof of such total and permanent disability, the benefits shall become effective, subject to the conditions herein provided. If said total disability has been continuous for not less than three consecutive months immediately preceding the receipt of due proof, such disability, if not already approved as permanent, shall nevertheless be deemed to be permanent and upon the receipt of due proof of such disability the benefits shall become effective, subject to the conditions herein provided."

The language of the $15,000.00 policy is, of course, identical. The language of the $5,000.00 policy is the same

except that it provides only for the waiver of premium, using the following language:

> "If the insured shall become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the company will waive the payment of any premium falling due after receipt by the company at its Home Office during the insured's lifetime of due proof of total and permanent disability and will continue to waive payment of premiums for the period of said total disability of the insured prior to the maturity of this policy."

The definition of total and permanent disability and provision for continuance of disability for three months are identical with that quoted from the other policy. Provisions of this nature are of comparatively recent origin and there are not many cases in which they have been construed. There is, however, a rather sharp conflict of authority in construction of this type of provision. It will be noted that the policy provides that proof of the existence of a permanent total disability shall be given to the company while the policy is in force. The question naturally arises whether the insured may be excused from giving notice of this character and in case of a failure to give proof of the disability prior to default in payment of premium, these provisions are effective. There is a line of decisions to which the appellee will call the Court's attention, adhering to a very strict construction of this language.

Such, for example, is *Wick v. Western Union Life Insurance Company,* 104 Wash. 129, 175 Pac. 953. In that case the Court, construing similar language in a policy, holds, in substance, that there is no contract to pay disa-

bility benefits except in the situation where proof of disability is given prior to default in payment of premium, and that therefore claim for disability benefits made after default in payment comes too late.

We believe, however, that the better reasoned cases and the weight of authority is to the contrary. In the final analysis the peril insured against is a total permanent disability. The man purchasing insurance is given to understand that in case of his disability he shall receive a monthly income and in addition thereto his life insurance will be kept in force without the payment of additional premiums. For this protection he pays a certain definite portion of the aggregate premium. Admitting, of course, that provisions requiring notice of the occurrence of the peril insured against are reasonable and in ordinary cases should be enforced for the protection of the company, yet provisions of this nature are incidental and not an integral part of the original contract of insurance. Provisions in a policy for the payment of premium and other provisions constituting conditions precedent to the coverage are on an entirely different basis. For instance, take the "iron safe clause" occurring in fire insurance policies, where in substance the company agrees to insure provided premium is paid and the insured keeps certain records of his business in an iron safe. Such provisions go to the very contract of insurance and constitute conditions precedent.

Turning again, however, to provisions such as here involved, the company agrees that the insured shall receive the benefit of certain "disability benefits," provided he becomes disabled while the policy is in force. If he has paid his premium and if he becomes totally permanently dis-

abled, the occurrence of the risk entitles him to the benefits. Proof of disability is provided for just as proofs of loss are required in other types of insurance. Yet the substance of the contract is that as soon as the company receives notice of the disability, the insured shall be entitled to his benefits. This type of provision differs somewhat from the ordinary provision inserted in accident policies which require notice of the happening of the accident within a certain numbers of days. In this type of provision, instead of requiring notice within any given time, the company provides merely that it will not pay until it receives the proof. The gist of its contract, however, is to pay the benefits in case of the happening of the contingency. It is our position that such provision does not make time the essence of the giving of the notice, and that if the insured can show a reasonable excuse for failing to give notice promptly, then he is entitled to receive his benefits, provided he can prove that the risk or peril insured against has actually occurred.

Suppose, for instance, while the policy is in force the insured is injured and is rendered unconscious or in such physical condition that it is impossible for him to give notice. It seems unbelievable that his policy could be canceled for non-payment of premium while he remained in that condition. So also he must be excused when he shows that he was ignorant of the fact that he was permanently disabled. If the insured holding this type of policy lost both of his legs, there would be little excuse for his failure to notify the company prior to default in the payment of premium. It must be recollected, however, that the peril insured against in this instance is not illness or mere temporary disability. No benefit is allowed by this insurance

for such disability. The disability insured against must be permanent. True, the plaintiff in this action knew that he was sick, but he did not know that his illness was of a permanent character which rendered him totally and permanently disabled. Upon the happening of that contingency there could be no default in the payment of premium for the obvious reason that no further premium could become due during the continuance of the disability. Notice of any kind to the company would have required that the company waive all further premiums and pay to the insured an aggregate of $250.00 per month during the period of disability.

We do not find a California decision in point. We do find, however, that the Federal Court has taken an unequivocal stand in its interpretation of this type of provision. In *Minnesota Mutual Life Insurance Company v. Marshall* (C. C. A., 8), 29 Fed. (2d) 977, the policy involved provided that if the insured, while the policy is in full force and effect and without default in the payment of premium "shall become totally and permanently disabled, as hereinafter provided, and shall furnish satisfactory proof thereof, the company will waive the payment of premiums thereafter becoming due. * * * * Second: Upon the receipt of due proof of total and permanent disabilities as above defined, the company will waive the payment of all premiums thereafter becoming due." It is of passing interest, though of no importance, that the policy in question was written on October 14, 1925,—the same date as borne by the $10,000.00 policy in the instant case. Prior to the end of the first year the insured became ill. During the period of his illness the second annual premium became due and was unpaid. His illness continued and he was operated on

for appendicitis shortly after the expiration of the grace period, and about two weeks later he died. The Court said:

> "On the question of when the time of waiver of the payment of premiums begins under policy provisions similar to these quoted, there are two lines of decisions; one holding that proof of disability fixes the time when the waiver begins; and the other holding that the time of waiver is the time of disability, and that a reasonable time thereafter is allowed to make proof of such disability, and that if death occurs before the proof of disability is made, although after the due date of the premium, the insurance company is liable, where the disability arises before the due date of the premium, and continues until death.
>
> "It is unnecessary to attempt to distinguish the language of the policies upon which these differing opinions are based. They unquestionably put a different construction upon practically the same provisions of insurance policies. They differ as to the construction of the same or similar language. These decisions of themselves establish doubt as to the construction and meaning of the provisions which we are called upon to interpret. It is a familiar rule of construction that where contracts of insurance are prepared by the insurer and there is doubt as to the meaning of their provisions, it will be construed most favorably to the insured.
>
> " 'It is said that compliance with this provision, even though impossible, was a condition precedent to the securing of insurance. But narrow and unreasonable interpretations of clauses in an insurance policy are

not favored. They are prepared by the insurer and if, with equal reason, open to two constructions, that most favorable to the insured will be adopted.' *Josephine Stipcich v. Metropolitan Life Insurance Co.,* 277 U. S. 311, 48 S. Ct. 512, 72 L. Ed. 895.

"Forfeitures are not favored: 'The rule is that if policies of insurance contain inconsistent provisions or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain rather than forfeit the contract.' *McMaster v. New York Life Ins. Co.,* 183 U. S. 25, 22 S. Ct. 10, 46 L. Ed. 64.

"However much the legal mind may differ as to the meaning of these provisions, the ordinary layman would construe them to mean that, in the event he became disabled before his premium fell due, his insurance would be continued until his disability was removed or until his death. That is the natural and reasonable construction to be placed upon the language used in this policy. Any other construction to my mind, would be contrary to the full purpose of the contract and deprive the insured of one of the principal benefits of his policy. The right of the insured to have his premiums discontinued during disability is one that he had paid for. To make its operation depend upon the time of proof of disability, and not upon the time of disability itself, which was the real thing that he was protecting himself against, renders the provision of the policy under construction inoperative and the right of no value.

"If the insured had died during the grace period of

his policy, without the payment of the premium which fell due October 14th, no question would be raised as to the right of his beneficiary to recover. Why should a different rule be applied when a disability during the grace period is sustained which renders him totally and permanently disabled? To give the insured the full benefit of his policy, and carry out the intention which was doubtless in the minds of the contracting parties when the policy was written, his policy should not be allowed to forfeit where his disability occurs during the grace period of his policy and continues until his death. Any other construction would be a harsh one and deprive him of a right for which he had paid the insurance company, and which he could only enjoy by employing in advance some agent to protect for him. Why so construe this disability clause in insurance policies as to make it worthless in many cases? Death benefits are good for thirteen months, and are fixed as of the date of death. Why should not the disability benefits be good for the same length of time, and begin as of the date of the disability? This is not an unreasonable and strained construction, and would be more in keeping, perhaps, with the representations made at the time of writing the insurance policy. The same measure of protection should be extended to the insured during the thirteenth month that he admittedly has during the other twelve months.

"Courts taking a different view have unconsciously, in my opinion, been influenced by the belief that the insured did not, if he had lived, intend to continue the insurance. But this should not in any way determine the construction to be placed upon these doubtful provi-

sions, for the right to protection in case of disability has been paid for for the same length of time allowed in case of death. So long as the insured was in good standing, and he became disabled, under the provisions of his policy he had a right to protection.

"A construction making the disability benefits to begin as of the time of proof might be all right, where such benefits are sought while the insured is living, but a disability provision such as the one to be construed here, where the disability occurs near the due date of the premium and continues until death, is made worthless by holding the proof of disability and not the disability itself makes it operative. Such a construction is harsh and unreasonable and ought not to be adopted if the language used is susceptible of one more favorable to the insured. *Southern Insurance Co. v. Hazard*, 148 Ky. 465, 146 S. W. 1107; *Merchants' Life Insurance Co. v. Clark* (Tex. Civ. App.) 256 S. W. 969."

Just what the Court had in mind by the dictum relative to the collection of benefits during the lifetime of the assured is difficult to state. Probably the Court referred to decisions rendered upon accident policies. We believe, however, that other decisions which we will refer to will demonstrate that there is no difference in the status of the provisions for the waiver of premiums and the provisions for the payment of total disability. It will be noted that the language of the policies is the same with reference to both types of "disability benefits," and that the $5,000.00 policy refers to the waiver of premium in the same language.

Since the trial of this case the United States Supreme Court has handed down its decision in *Bergholm v. Peoria*

Life Insurance Company, 76 L. Ed. 306, in which reco ry of disability benefits was denied because of the fact at no application was made while the policy was in force, d it is entirely possible that the respondent may seek e comfort from this decision. It is to be noted, how r, that although the Supreme Court granted certiorari e- cause of a supposed conflict with the decision in *Minn a Mutual Life Insurance Company v. Marshall, supra*, n further consideration that opinion is not disturbed. s to be noted that in the Bergholm case no equitable ex e was offered for a failure to give the notice require y the terms of the policy. It is to be noted further tha e language contained in the policies sued upon in this a n is more nearly similar to that contained in the Mar ll case than that set forth in the Bergholm case. The Mar ll case stands, therefore, as authority for the propos n urged upon this appeal.

In the foregoing decision the Court cites with app al two cases. The first is *Southern Life Insurance Com y v. Hazard*, 148 Ky. 465, 146 S. W. 1107. In this cas e policy was issued September 27, 1909, and an annual e- mium paid. The insured became totally and perman y disabled on June 25, 1910, which disability continued il the time of his death on May 8, 1911. In the meantime e was a default in the payment of premium. The po y - vided:

> "Premiums on this contract will be paid by the - pany if insured is wholly disabled. After one - nual payment shall have been made, and before - fault in the payment of any subsequent premium e insured shall furnish satisfactory proof that s

been wholly disabled by bodily injuries or disease * * * the company * * * will agree to pay for the insured the premiums, if any, which shall thereafter become payable during the continuance of such disability."

In a well considered opinion the Court held that the disability having occurred, the insurance might be collected by his estate despite the fact that no proof of disability was given the company. Among other things, the Court said:

"In the case at bar Hazard's right to have the company pay his premiums was fixed, under the terms of the policy, at the time he became disabled, on June 25, 1910. He was not required to pay anything to have that right perfected, since by the terms of the policy all he had to do was to furnish proof of his disability. The right, therefore, having been fixed during the life of the policy, and without the payment of any further premiums, it is apparent, under the authority of the Montgomery Case, and the other cases heretofore cited, that time was not of the essence of Hazard's right to have the company pay his premiums. The presumption naturally arises that, having become totally disabled physically, he was not in a condition to attend to his business with that promptness which is required of persons in a normal condition. It is such conditions as these that give rise to the doctrine that time is not, in equity, of the essence of the contract. Since Hazard had the right at the time he became disabled, for the mere asking, to have the company pay his premiums until his death, we see no reason why, under the authorities heretofore cited, that he should not have had a reasonable time thereafter in which to present the

Life Insurance Company, 76 L. Ed. 306, in which recovery of disability benefits was denied because of the fact that no application was made while the policy was in force, and it is entirely possible that the respondent may seek some comfort from this decision. It is to be noted, however, that although the Supreme Court granted certiorari because of a supposed conflict with the decision in *Minnesota Mutual Life Insurance Company v. Marshall, supra,* upon further consideration that opinion is not disturbed. It is to be noted that in the Bergholm case no equitable excuse was offered for a failure to give the notice required by the terms of the policy. It is to be noted further that the language contained in the policies sued upon in this action is more nearly similar to that contained in the Marshall case than that set forth in the Bergholm case. The Marshall case stands, therefore, as authority for the proposition urged upon this appeal.

In the foregoing decision the Court cites with approval two cases. The first is *Southern Life Insurance Company v. Hazard,* 148 Ky. 465, 146 S. W. 1107. In this case the policy was issued September 27, 1909, and an annual premium paid. The insured became totally and permanently disabled on June 25, 1910, which disability continued until the time of his death on May 8, 1911. In the meantime there was a default in the payment of premium. The policy provided:

> "Premiums on this contract will be paid by the company if insured is wholly disabled. After one full annual payment shall have been made, and before a default in the payment of any subsequent premium, if the insured shall furnish satisfactory proof that he has

> been wholly disabled by bodily injuries or disease * * * the company * * * will agree to pay for the insured the premiums, if any, which shall thereafter become payable during the continuance of such disability."

In a well considered opinion the Court held that the disability having occurred, the insurance might be collected by his estate despite the fact that no proof of disability was given the company. Among other things, the Court said:

> "In the case at bar Hazard's right to have the company pay his premiums was fixed, under the terms of the policy, at the time he became disabled, on June 25, 1910. He was not required to pay anything to have that right perfected, since by the terms of the policy all he had to do was to furnish proof of his disability. The right, therefore, having been fixed during the life of the policy, and without the payment of any further premiums, it is apparent, under the authority of the Montgomery Case, and the other cases heretofore cited, that time was not of the essence of Hazard's right to have the company pay his premiums. The presumption naturally arises that, having become totally disabled physically, he was not in a condition to attend to his business with that promptness which is required of persons in a normal condition. It is such conditions as these that give rise to the doctrine that time is not, in equity, of the essence of the contract. Since Hazard had the right at the time he became disabled, for the mere asking, to have the company pay his premiums until his death, we see no reason why, under the authorities heretofore cited, that he should not have had a reasonable time thereafter in which to present the

> proofs of his disability as required by the policy. Under the facts of this case we are clearly of opinion that the proofs of disability were furnished within a reasonable time."

The second case cited by the Court in the Marshall case is *Merchants' Life Insurance Company v. Clark* (Tex. Civ. App.), 256 S. W. 969. The policy there involved provided for payments of monthly income and waiver of premiums in case of disability. The policy provided:

> "The first instalment of the above benefit will be paid immediately upon receipt of due and satisfactory proof of such total and permanent disability, or of any such injuries as above defined."

The insured became disabled by sickness and insanity while the policy was in force, which disability continued until his death, after default in the payment of premium. The Court said:

> "The insured being entitled, according to the finding of the jury, to demand payment of the instalments on making the proof, request, and waiver, the most appellant could contend for with reference to proof, etc., was that it be made within a reasonable time after the disability arose. The judgment involves a finding that the insured died before the expiration of such a time, and the policy provided that if the insured, being entitled to the instalments because of his disability, should die before all of same were made to him, the amount of the instalments not paid should be paid to appellee 'upon receipt of due proof of the death of the insured.'
>
> "On the case stated, we think it should be held (1)

> that the provision in the policy that appellant was to waive the payment of premiums while the insured was disabled, within the meaning of the policy operated, the insured being so disabled, to relieve him of the necessity of paying the premium in question within the time specified in the policy; (2) that the insured, because so disabled, was entitled at the time he died to demand of appellant payment of the annual instalments provided for in the policy, on making proof of such disability and request and waiver, as provided in the policy; (3) that the policy being, for the reasons stated, a valid obligation enforceable by the insured against appellant at the time he died, at his death became enforceable by appellee against appellant."

It is noticeable that in this connection the Court makes no distinction between the payments of disability income and the waiver of premium.

In *Missouri State Life Insurance Company v. Le Fevre* (Tex. Civ. App.), 10 S. W. (2d) 267, the policy contained provision for the waiver of premium in case the assured became totally and permanently disabled. The policy provided:

> "Disability benefits as provided on page 1 will be effective only upon receipt at the company's home office while no premium is in default, of due proof of existing total and permanent disability as hereinafter defined, providing such disability originated after this policy became effective and before its anniversary on which the insured's age at nearest birthday is 60 years, and will apply only to premiums falling due after receipt of such proof."

Other provisions as to a continuing disability for three months were almost identical with the language of the policies involved in the instant case. The insured became disabled from an attack of typhoid fever while the policy was in force. His illness continued until after default and the expiration of the grace period, resulting in his death. The Court said:

> "The contract for the disability benefit recites:
>
> " 'The annual premiums for the Total and permanent Disability benefits is 73 cents and is included in the premium stated in the consideration clause.'
>
> "Said contract also recites:
>
> " 'Premiums waived will not be deducted in any settlement under this policy.'
>
> "The effect of appellant's obligation to the assured, upon a sufficient consideration, was, if he became totally and permanently disabled, to allow him a sick benefit to the amount of the premiums thereafter accruing and in lieu of paying same to the assured, to apply same to the premiums accruing on his life insurance. The evident purpose of the disability provision was to preserve the insurance in the event the insured, on account of disability, became unable to make the money to pay the premiums, and said provision should be construed so as to effectuate this intention. So, where the insured was rendered incapable of furnishing proofs of disability by reason of such disability, then it must be presumed the parties did not intend by the language used to deprive the insured of the benefit he was to receive. We think the weight of authority is, and ought to be, that the stipulation as to the time within which notice or proof of disability should be given is

not necessarily to be literally complied with. Such provisions operate upon the contract only subsequent to the fact of the accident or sickness. Also, that where the failure to give prompt notice is not due to the negligence of the insured or his beneficiary, but such compliance has been prevented and rendered impossible from the nature of the situation, this would furnish a sufficient legal excuse for the delay in giving the stipulated notice; and this doctrine has been applied in cases in which a stipulated time for the giving of the notice or making the proof of disability has been fixed by the contract. * * * *

"We do not think the time of making the proof of disability was of the essence of the contract."

In *Metropolitan Life Insurance Company v. Carroll* (Ky.), 273 S. W. 54, the policy contained provisions for the waiver of premium in case the company received proof "after this policy has been in force one full year, and before default in the payment of any subsequent premium." During the grace period insured became disabled by disease and died a few days after the expiration of the grace period. Following the rule laid down in the Hazard case, the Court held that the beneficiary could collect the policy. The Court said:

"Before the days of grace expired and on July 15th, the insured was stricken with a mortal disease. He could not present proofs before he was taken sick, and it would be a very unreasonable construction of the contract to say that he lost his rights by not presenting proofs while in this condition and before his death on July 30th. Such a construction of the contract would

make it of no value to the insured in such cases, although this clause of the contract would, in many cases, be the inducement for taking the insurance, for this kind of insurance is usually taken by people who work for a living and who would rely on the company carrying the premium in case they become disabled.

"A very strict rule has been followed in favor of the insurer where the annual premium is not paid when due but this is for the reason that the annual premium is the basis of the contract and the business cannot be carried on without the payment of the premiums. But the furnishing of proofs of disability is entirely a different matter and it is a sound rule that time is not of the essence of the contract and that proofs may be furnished in a reasonable time. It would have been nugatory to furnish the proofs after the insured died and after the insurer denied liability on the contract. The denial of liability excused the furnishing of proofs then, and a reasonable time for furnishing the proofs had not then elapsed."

In *Fidelity Mutual Life Insurance Company v. Gardner's Administrator,* 233 Ky. 88, 25 S. W. (2d) 69, the policy provided for a waiver of premium and a disability income, provided proof of disability was received by the company "after the first premium shall have been paid hereunder and prior to default in payment of any subsequent premium, upon receipt by the company at its head office of due proof," etc. The first two years' premiums had been paid. The third premium became due and was unpaid. During the grace period the insured became ill, was sent to the hospital for operation and died subsequent

to the expiration of the grace period. The Hazard case and Carroll case, heretofore referred to, were relied upon by the Court, which held that the beneficiary of the insured can recover.

In *Bank of Commerce and Trust Company v. Northwestern National Life Insurance Company* (Tenn.), 26 S. W. (2d) 135, the policy contained provision for waiver of premium and payment of disability income in case the insured became totally and permanently disabled while the policy was in full force. The insured was taken ill with pneumonia during the grace period of the policy and died after the expiration of that period. The company contended that the provision for the waiver of premium did not become effective unless proof thereof was received prior to a default in the payment of premium The Court held, however, that the beneficiary could collect, following the decision of *Minnesota Mutual Life Insurance Company v. Marsall, supra.* The decision is based largely upon a construction of the policy, the Court pointing out that insofar as the company undertakes to insure against total disability, any provision seeking to limit the enforcement of the policy is repugnant to the undertaking and must therefore be strictly construed against the company.

In *Mid-Continent Life Insurance Company v. Hubbard* (Tex.), 32 S. W. (2d) 701, decided in November, 1930, the policy contained language almost identical with that here involved. The second annual premium became due and the company accepted a note payable in five months. Prior to the maturity of the note the insured was taken ill and remained totally disabled until his death, which occurred after

the note became due. The Court held that the beneficiary could recover, saying:

> "We think the construction insisted upon by appellant is unreasonable and contrary to the intention of the parties as manifested by a rational survey of the whole contract. Obviously, that intention was that in event the insured be injured or fall ill, and as a consequence unable to carry on his business or affairs, he would be relieved of the obligation to pay any premiums subsequently to become due, so long as he was incapacitated by his disability; that if he became incapacitated his income would cease, and his resources, if any, be required to sustain him in his illness; wherefore, his payment of insurance premiums should cease. Such was the obvious intention of the parties, gathered from the four corners of the contract. But when, at what juncture in the relation of the parties, should this suspension of payments begin? Should it operate upon the payment of the premium next due, or should it be postponed to the second such premium to become due? Obviously it was the intention that the moratorium begin at once upon the happening of the direful contingency which was to set it in operation; or, at most, within a reasonable time thereafter, since the requirement of prior proof of loss had been eliminated from the case. More obviously still was it the intention that the waiver should operate upon the annual premium next due, that it was not to pass around that premium and seize upon the second one to become due.
>
> "Appellant stresses the language of the waiver clause by which it is provided that in the contingency which happened here, then 'commencing with the anniver-

sary of the policy next succeeding the receipt of proof the company will on each anniversary waive payment of the premium for the ensuing insurance year.' Appellant argues very ably that the word 'anniversary' must be given controlling significance in construing this clause, and insists that the obligation to waive could not become operative until the next anniversary date of the policy, January 13, 1929, or upon any premium except that for the third year, which would have become due on said date. But we think that construction inconsistent with the obvious intention of the parties as disclosed by the contract, when viewed in the light of the case made here.

"For here, by express agreement, the premium for the second year did not mature prior to the date of insured's disability, or until three months thereafter, and under the terms of that agreement, as expressed in the blue note, 'all rights under the policy shall be the same as if the premium had been promptly paid when due.' In short, the insured became disabled while the policy was in full force and effect, and this contingency set in operation the waiver which, under a reasonable construction of the policy, was clearly intended to apply to all unpaid annual premiums not then due under the terms of the policy as modified by the solemn agreements of the parties to the contract."

That there is no difference between the construction of these policies with reference to the waiver of premium and the payment of disability income is demonstrated by *Intersouthern Life Insurance Company v. Hughes' Committee*, 6 S. W. (2d) 447, 224 Ky. 405. The policy provided that in case of total disability premiums would be

waived and an income paid. During the first year of the policy the insured became insane. Subsequently some settlement was made between the insured and the company, wherein the policy was surrendered to the company. In this action the committee for the insane assured was permitted to recover those instalments of disability income falling due during the term of the disability, it being held that the settlement and surrender of the policy might be disregarded because of the incompetency of the insured to make such settlement.

In *Levan v. Metropolitan Life Insurance Company,* 138 S. C. 253, 136 S. E. 304, the policy contained a provision for the waiver of premium in language practically identical with that contained in the policies under consideration. The insured became ill and was mentally deranged when the premium fell due. He was taken to the state hospital for the insane, where he died after the expiration of the grace period. A recovery was permitted upon the theory that the insanity of the insured excused his failure to notify the company of his disability, and that therefore his beneficiaries could recover upon the policy, despite the express provision that notice should be given "while the above numbered policy is in full force and effect and before default in the payment of any premium." It was held by the Court that the insanity of the assured excused the giving of notice, and that due to the fact that the assured was actually disabled during the time the policy was in force, the risk insured against had occurred, and that therefore the policy should be considered as being in full force at the time of his death.

In *McColgan v. New York Life Insurance Company,* 36

Ohio App. 123, 172 N. E. 849, policy was issued May 25, 1926. While the policy was in force, the insured became totally and permanently disabled by disease and died on July 9, 1927. The second annual premium was not paid and no notice of disability was given until October, 1927, after the assured's death. The policy contained provision for the waiver of premium, which appears to be practically identical with that here involved, it requiring that proof of disability be received before default in the payment of any premium. Judgment was rendered by the Trial Court in favor of the defendant upon plaintiff's opening statement, which judgment was reversed by the Appellate Court. The Court said:

> "By the plain and unambiguous words of the policy, it is kept in full force in event the insured is totally disabled on the due date of a premium, if such disability continues for a definite period of time and timely notice of such total disability is given to the company.
>
> "It being admitted by the defendant's motion that the insured was so disabled and that the defendant received notice of that fact within the period of time fixed by the policy, it follows that the judgment of the trial court was wrong."

In *State Life Insurance Company v. Fann* (Tex)., 269 S. W. 1111, policy was issued December 20, 1920. In December, 1921, notes were given to cover the second year's premium then due. Premium notes falling due June 20, 1922, remained unpaid. The insured became disabled by reason of insanity April 1, 1922, and remained in that condition until his death November 6, 1923. In August, 1922, the company notified the insured that the policy had lapsed

and sent him a check for an unearned portion of the premium note, which check was cashed and retained by the insured. The Court said:

"At the time the premium note came due, and prior thereto, the insured had become insane. Did his failure to notify the company of his disability bar a recovery on the policy? We think not. The time for the payment of the premium having been extended by the company by the acceptance of the note of the insured, such extended time of payment cannot be considered as a matter of grace, but must be held to be a matter of right, based on contract. The insurance company did not, in accepting the insured's note, reserve the right to cancel the policy at any time it saw fit, pending the maturity of the note, but bound itself to extend the time of payment to the due date of the note. Of course, upon the failure to pay the premium note when due, such failure was equivalent to a failure to pay the premium, and would work a forfeiture of the policy (*Underwood v. Security Life & Annuity Co.,* 108 Tex. 381, 194 S. W. 585), except for the provisions of the disability clause above quoted. The Texarkana Court of Civil Appeals, in the case of *Merchants' Life Ins. Co. v. Clark,* 256 S. W. 969, holds:

" 'It did not appear from the forfeiture clause, or any other part of the policy, that the proof, request, and waiver referred to must have been made before the expiration of the 31 days specified. On the contrary, the time within which the insured was to make such proof, etc., was not limited by anything in the policy.'

"And further held:

" '(1) That the provision in the policy that appel-

lant was to waive the payment of premiums while the insured was disabled, within the meaning of the policy, operated, the insured being so disabled, to relieve him of the necessity of paying the premium in question within the time specified in the policy.'

"Under the authority of this case, the Supreme Court having refused an application for writ of error, we hold that the life insurance policy sued on in this case was not forfeited by the failure of the insured to pay the premium note in question, or to notify the company of his disability."

In *Hagman v. Equitable Life Assurance Society*, 214 Ky. 56, 282 S. W. 1112, the policy contained a provision that the payments for disability should be payable six months after receipt of proofs of such total and permanent disability and monthly thereafter during the continuance of such total and permanent disability. The excuse given for failure to give notice as required by the policy was that the policy itself was in the possession of the company by reason of a loan having been given to the assured. In construing the provision of the policy, the Court said:

"The clause providing that the income shall be payable six months after receiving such proof, and monthly thereafter, does not provide that only one monthly payment is to be made then. To so construe the contract would make it a contract to pay the annual income after eight months of total disability. That cannot be the meaning of the contract; it provides that the total disability shall be presumed to be permanent when it is present and has existed continuously for three months. The purpose of postponing pay day was to give the

company an opportunity to investigate the facts. The provision that the payments are to be made monthly *thereafter* indicates that a monthly payment then was not contemplated. The purpose of such a provision is to provide the insured with an income in case of total disability, and the natural meaning of the contract is that this income will begin after the total disability has continued sixty days and he furnishes proof thereof. The right to relief from the payment of premium and the right to an annual income of $2,400 accrue at the same time. The insured would not understand when he took this policy, and it was not intended that he should understand, that these rights did not accrue until total disability had existed for eight months."

This case has heretofore been referred to as illustrative of what constitutes total disability.

In *Aetna Life Insurance Company v. Palmer,* 159 Ga. 371, 125 S. E. 829, the question was certified to the Supreme Court whether under a policy similar to that here involved and disability of the assured occurring while the policy was in force, the failure to notify the company of the disability prior to default and expiration of the grace period prevented a recovery of monthly disability income. In a well considered opinion the Court held that the giving of such notice prior to such default was not a condition precedent.

It will be seen from the foregoing authorities that the question here involved has been dealt with by the Court from several different angles. The sum and substance of these rulings appears to be that the provision of the policy for giving of notice prior to default is not an integral part of

the contract of insurance, and that in case of disability occurring while the policy is in force, a failure to give notice may be excused. Inability to give notice certainly is an excuse, and where the assured does not know that the disability from which he is then suffering is permanent in character, the giving of such notice would be a physical impossibility.

As the facts are now established, at the time the annual premiums became due on these policies, facts existed which excused their payment. The express contract of the company was to keep the policies in force without further payment. As the facts then existed, the plaintiff owed the company nothing. On the contrary, the company owed the plaitiff for several months' disability income. The notes given for premiums for the second year were therefore actually without consideration, they represented no obligation to the insurance company, and their surrender constituted no consideration. The entire transaction of the surrender of these policies was entered into by a mutual mistake of fact.

A case very similar in principle is *Hawthorne v. Travelers' Protective Association,* 112 Kan. 356, 210 Pac. 1086, 29 A. L. R. 494. This case involved an accident policy providing for the payment of income during the period of disability occasioned by accident. The policy expressly provided that there should be no liability unless the assured should immediately notify the insurer of any disabling injury. The policy provided that such notice must be given within thirty days of the time of the accident and that "in case of failure to notify, except because of unconsciousness or physical disability, the member or his beneficiary in case

of death, shall forfeit all rights to insurance benefits." In April, 1913, the insured was nailing wire netting to his porch, standing upon an upturned candy bucket and holding a fence staple in his mouth. The bucket collapsed, causing the insured to fall, and the staple disappeared. Thinking that perhaps the staple had gone down his throat, he consulted physicians, but they assured him that he was mistaken. As a matter of fact, he had swallowed the staple, but did not learn of such fact until it was revealed lodged in his throat by an X-ray examination early in 1915. In the meantime he had suffered disability but believed it was due to other causes and not to an accident, within the meaning of the policy. The Court, in a well considered opinion, held that his ignorance of the accidental cause of his disability excused the notice, which was actually given within a reasonable time after the staple was removed from his throat. Action was brought on the policy in April, 1920, and within the time limited for commencement of actions upon written contracts. The Court said:

> "That the modern tendency is to hold insurers to a more strict accountability is undoubted. Those who disapprove the process often characterize it as making a new contract for the parties. We think it may fairly be called interpreting the contract in the light of the general purpose for which it was entered into, and of the consideration that the obvious purpose of an insurance policy is to insure. The language employed in an insurance policy may properly be limited in its application to the situation to which it is adapted, and which it presumably was intended to meet. We do not undertake to say that a valid insurance contract could not be drawn providing for a forfeiture of the right to

indemnity if the insured should fail to give notice of something that he did not know had taken place. But a purpose to impose a condition so impossible of performance ought not to be attributed to the parties, unless evidenced by express and unmistakable language, as, for instance, by saying that ignorance of the fact should not excuse a delay. In the present case the inference that because two exceptions to the rule requiring notice at the time of injury are expressed—unconsciousness and physical disability—it was not intended that want of knowledge should be implied may well give way to the presumption that only a fair and reasonable requirement was intended."

The following miscellaneous cases throw additional light upon the failure to pay subsequent premiums:

In *Newman v. John Hancock Mutual Life Insurance Company,* 216 Mo. App. 180, 7 S. W. (2d) 1015, it was held that where premium was refused by the insurer under the mistaken theory that the policy was in default, the insured was not required to tender payment of further premiums in order to preserve his rights under the original policy.

In *Inter-Southern Life Insurance Company v. Duff,* 184 Ky. 227, 211 S. W. 738, it was held that the insured was relieved of tendering subsequent premiums, where the company had wrongfully refused to accept the premiums.

In *Security Life Insurance Company v. Gottman* (Ind. App.), 156 N. E. 173, it was held that further performance on the part of the insured was excused where the policy was wrongfully declared to be forfeited by the company.

In *Spencer v. Security Benefit Association* (Mo. App.), 297 S. W. 989, it was held that the insured was not required to pay subsequent premiums after the insurer wrongfully attempted to forfeit the policy.

An interesting case in this connection is *Frommelt v. Travelers' Insurance Company,* 150 Minn. 66, 184 N. W. 565. In this case it was sought to excuse failure to give notice of loss as provided by the terms of the policy. It appeared that shortly after the time of the death of insured an agent of the company had taken up the policy and had given to the beneficiary certain money which it was claimed was a refund of a portion of the premium. It was held that the failure to give notice was properly excused. The Court said:

> "The requirement of immediate notice is a requirement of notice within a reasonable time, and what is a reasonable time depends on the circumstances of the particular case. *C. S. Brackett & Co. v. General Accident F. & L. Assur. Corp.* 140 Minn. 271, 167 N. W. 798. The fact that the poicy was not in the possession of plaintiff, but of the company, is important (*Curran v. National Life Ins. Co.,* 251 Pa. St. 420, 96 Atl. 1041: *Solomon v. Continental Fire Ins. Co.,* 160 N. Y. 595, 55 N. E. 279, 46 L. R. A. 682, 73 Am. St. Rep. 707), for plaintiff could have no knowledge of its terms, and, without disparagement of her case, it may well be said that she probably did not realize at once that her husband's death was due to accident. Under such circumstances, we think the delay of plaintiff was excused." (Page 566.)

Two other cases may be of more than passing interest to

the Court. In *Shafer v. United States Casualty Company,* 156 Pac. 861, 90 Wash. 687, it was held that the failure to give to the insurer notice of an accident within the time provided by the policy was excused where the insured did not know that the accident had happened. There the insurance covered liability of the insured growing out of any accidental injury in and about the operation of a certain building. An accident occurred, but the assured knew nothing of it. It was held, therefore, that they could not be required to give to the company notice of something which was unknown ot them.

In *Houseman v. Home Insurance Company* 88 S. E. 1048, 78 W. Va. 203, L. R. A. 1917-A 299, it was held that insanity of the insured was a sufficient excuse for the failure to give notice as provided by the policy. In this connection we again ask the Court to bear in mind that we are not here concerned with the failure to pay a premium but are concerned only with the failure to give the notice of the happening of a permanent disability which automatically continued the policies in force without payment of premium.

It is true, of course, that there was considerable delay before plaintiff's claim was actually made. Under the foregoing authorities this delay is amply excused. After the transactions relative to the surrender of the policies in 1927 the plaintiff did not have these policies in his possession. As shown by the evidence, he firmly believed that the entire transaction was at an end. Several months elapsed before he discovered the nature of his ailment and it was not until the latter part of that year that he discovered that his ailment had extended back to July, 1926, and that he had then been afflicted with tuberculosis. It was not until demand

was made upon him for the payment of the note for $339.39, at which time he was informed that he had had the benefit of insurance during 1926 and should therefore pay for it, that he realized for the first time that during that period the risk against which he carried insurance had occurred, and that he was required to pay for insurance against that very risk. He thereupon promptly made claim, payment of which was refused. It is interesting to note that after this controversy arose he was compelled to pay for the insurance. (T. 175.) Yet defendant takes the position that although entitled to payment for issuing the insurance and although the risk insured against occurred, it is relieved from the terms of its contract because appellant failed to give prompt notice, when the giving of such notice was rendered impossible because of his ignorance of the facts. We submit that such failure is completely excused by the facts shown by the undisputed testimony.

IV

The Attempted Cancellation and Surrender of the Policies was Ineffectual

Little need be added relative to this feature of the controversy. It is true that by the series of transactions occurring in the early part of 1927 the policies were surrendered and premiums were collected from the plaintiff for insurance up to and including March 18, 1927. This fact, however, furnishes no defense whatever. This is an equitable proceeding and the Court has entire power to and must disregard these releases when made under a mistake of fact and when not supported by any consideration. It must be conceded by the respondent that at the time of these transactions it was believed both by the insured and the insurer

that premiums for the second year's insurance were due and payable. Both parties to the transaction thought that no risk insured against had occurred. Both parties were ignorant of the true nature of plaintiff's disability. Both parties believed that the plaintiff owed the defendant money for premiums. Neither party realized that the risk insured against had occurred, and that as a result of the happening thereof no premiums were payable. In each of the three policies express provision is contained whereby for a certain named premium the company agrees to carry the insurance in force for the period of the disability without further premium. There was therefore nothing actually due from the plaintiff to the defendant. On the contrary, by the additional provisions contained in the policies for $10,000.00 and $15,000.00, respectively, the defendant was obligated to the plaintiff for the sum of $250.00 per month during disability, a period of something over seven months. The fact was that unknown to the parties, the defendant was then obligated to pay to the plaintiff something more than $1,800.00. We submit that no clearer case of lack of consideration and mutual mistake can be imagined. We need no further authority, therefore, for the proposition that these releases or surrenders of the policies were ineffectual and furnish no defense whatever.

All of the findings of the trial Court with reference to the surrender of these policies and of laches on the part of the plaintiff in making his claim against the company are predicated upon the express finding and theory that the plaintiff was not disabled during the term of the policy. If that finding falls, all other findings must fall with it. If that finding falls, a new trial is necessary. On the contrary,

if that finding is sustained, it ends the case and it is unnecessary to consider any of the other features.

In Conclusion

We respectfully submit that the adverse findings of the trial Court were contrary to the evidence, and that the plaintiff is entitled to a new trial. It is entirely possible that upon a new trial the Court may feel that to do complete equity to the parties some adjustment may be necessary in the amount of the plaintiff's recovery to cover all possible contingencies of interest, dividends and similar matters in connection therewith. It may be possible that some equitable adjustment should be made to adjust premiums which should have been paid in the absence of the surrender of the policies. Those questions, however, are details which can properly be taken care of in fixing the amount of recovery.

We respectfully submit that the judgment herein should be reversed.

Respectfully submitted,

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Attorneys for Plaintiff and Appellant.

No. 6873.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

James McCulloch, Jr., *Appellant*,

vs.

The Penn Mutual Life Insurance Company of Philadelphia, a corporation, *Appellee*.

APPELLEE'S ANSWERING BRIEF.

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APPELLEE'S ANSWERING BRIEF.

The purpose of this suit has been correctly stated by the appellant (Appellant's Opening Brief, p. 1). The dates of execution and delivery of the three policies involved, together with the principal sum and the premium provided for in each, have also been sufficiently set forth. We will hereafter analyze the transactions and circumstances by and under which the premiums were paid. A careful survey of the evidence will show that all three of the policies lapsed in 1926 by reason of non-payment of premiums. Whether or not these policies continued in effect by reason of the operation of the disability provisions contained in each will receive careful consideration. In this connection we will go into the evidence in

considerable detail to determine as approximately what date the insured became totally and permanently disabled. It is the plaintiff's position that he became disabled July 30, 1932 when he became ill with pleurisy with effusions, possibly showing some traces of a tubercular condition. After considering the testimony offered in behalf of both the plaintiff and the defendant and taking into consideration the appearance and demeanor of each witness placed on the stand, the trial judge expressly found that plaintiff had not been totally and permanently disabled prior to April 30, 1937 (Tr. p. 149), at which date plaintiff concedes no rights under the policy could arise. (App. Op. Br. 14.) If there is any substantial evidence to support this finding, concededly plaintiff's appeal fails. If any of the policies lapsed by reason of non-payment of premium or for any other cause before plaintiff became permanently disabled, it is also conceded that plaintiff cannot recover under that policy. It is our firm belief that taking this view of the case alone, the decision of the trial judge should be affirmed. However, regardless of whether or not this Honorable Court agrees with the trial court on the above proposition, the plaintiff cannot recover under the policies involved in this suit. Each of the policies expressly provided that waiver of premium and disability benefits would not become effective until after submission of proofs of total and permanent disability, and that on the submission of such proofs the defendant would waive the payment of premiums *subsequently* falling due (not premiums falling due before submission of such proofs). The trial court properly found a further reason for rendering judgment against the plaintiff. The plaintiff's delay of over three years in bringing this action was unreasonable

and inexcusable and so worked to the disadvantage of defendant as to establish a complete defense of laches independent of the mere length of time. In order to avoid confusion and to present the facts and law involved as clearly as possible, we shall divide our discussion into the following groups:

1. Each of the three policies sued upon lapsed in 1926 by reason of nonpayment of premium.

2. The evidence clearly shows that the plaintiff did not become totally and permanently disabled while the policies were in force.

3. Submission of proof of total and permanent disability was a condition precedent to the waiver of premiums and payment of disability benefits.

4. Plaintiff's cause of action is barred by plaintiff's laches.

I.

Each of the Three Policies Sued Upon Lapsed in 1926 By Reason of Non-payment of Premium.

The appellant has evolved an ingenious and intricate mathematical formula which it is claimed conclusively proves that the premiums on all three of the policies were paid up to March 18, 1927. This formula, while extremely interesting from an academic viewpoint, utterly disregards the evidence produced at the trial on behalf of both plaintiff and defendant. The trial court expressly found that policy No. 1196774, by its terms, lapsed for nonpayment of premiums on November 28, 1926 [Findings 12, 13 and 14, Tr. 147, 148]; that policy No. 1196773 lapsed on the same date for the same reason [Fdg. 23, Tr. 152] and that policy No. 1191014 also lapsed for the

same reason [Fdgs. 5 and 8, Tr. 143, 145]. If there is any substantial evidence to support these findings, this Honorable Court should not disturb them. (App. Op. Br. 14.) The evidence on this point was not even conflicting; it all supported defendant's contentions. There was no evidence offered or presented to show that the premium on either of the policies was paid beyond the dates found by the trial court. It is true that plaintiff gave Mr. Carrell a note for $339.39, but the evidence clearly shows that only $276.29 was for term insurance, which went to pay back premiums. The balance was not meant to cover insurance under all or any of the policies. The testimony and evidence conclusively shows that this was a personal note given to Mr. Carrell and that it included certain other sums Carrell had paid out of his own pocket to take up bad checks given by the plaintiff to others. These advancements were an act of friendship made to prevent plaintiff's being criminally prosecuted and had no connection with the policy issued by defendant on plaintiff's life. [Tr. 225-231.] On cross-examination Charles L. Randolph testified [Tr. 228]:

> "Part of the difference between the two amounts $233.40 and $339.39 was personal between Mr. McCulloch and Mr. Carrell. I don't know what that represents. (Letter, Plaintiff's Exhibit 14 for identification.) That is part of the record of my files. The total amount of the term charge for which Mr. McCulloch gave his note to Mr. Carrell personally was $276.29, and there was an item of $64.79 which I understood represented a check which he took up for Mr. McCulloch in order to prevent him from being criminally prosecuted and he included this in the note to Mr. Carrell."

and in a letter written by Mr. Randolph to the defendant's home office, which was introduced into evidence by plaintiff as Exhibit No. 14, appears the following information [Tr. 229]:

> "We were billed Feb. 21, 1927 for term insurance as follows:
>
> Policy No. 1196773, (which is C) $48.00;
>
> Policy No. 1196774, (which is B) $185.40;
>
> Policy No. 1191014, (which is A, in typewriting) $41.20 (and then the figures in pencil), $42.98.
>
> Total (in typewriting) $274.60 (and in pencil), $276.29.
>
> This was paid by our agent, Don C. Carrell, and he has McCulloch's note for this amount, plus $64.79, representing a check which McCulloch issued that was not good and which Mr. Carrell paid to save criminal action being brought against him. Total amount of the note which Mr. Carrell holds is $339.39. McCulloch has not at any time paid one cent on it. The note, of course, is individual, and the Penn Mutual's name is not mentioned."

Plaintiff introduced this letter and should be bound by it, from this it is apparent that the balance of the $339.39 note represents sums paid by Mr. Carrell to prevent criminal prosecution against the plaintiff. It is, of course, obvious that no portion of that note was intended to be applied to payment of premiums on the policies in question to extend them beyond the date of their surrenders. The note was given on April 19, 1927 [Tr. 169, 178], sometime after the policies had expired and been surrendered and *after plaintiff's application for reinstatement had been denied.* Clearly the parties could not have intended this transaction as a reinstatement of the policies,

even assuming that there had been a mistake in the amount for which the note was made out. Such a mistake could not revive the expired policies. There would have had to have been a formal reinstatement of the policies with a new medical examination and the attendant formalities. It is also well to note that any further evidence on behalf of the defendant would have had to come from Mr. Carrell who at the date of the trial was on his death bed. This is just one example of how defendant was prejudiced by plaintiff's delay of over three years in informing the defendant of his claim.

We submit that Mr. Randolph's testimony, together with the letter introduced by plaintiff as Exhibit 8, constituted sufficient evidence to justify the trial court's conclusion on this point, particularly in view of the total absence of any evidence to the contrary.

II.

The Evidence Clearly Shows That the Plaintiff Did Not Become Totally and Permanently Disabled While the Policies Were in Force.

A. There Was no Coercion, Intimidation, Threats or Fraud Used to Procure the Surrender of the Policies.

From a reading of plaintiff's bill, together with appellant's opening brief (p. 7), one would be thoroughly convinced that the utmost fraud and sharp practice was indulged in by the defendant appellee, through its agents and through the assistance of the district attorney's office, to procure the surrender of these policies. However, the testimony clearly shows that this was not the fact and

the trial court expressly so found. In the memorandum opinion the lower court expressly stated [Tr. 134-135]:

> "The complaint is very much enlarged by charges against the defendant and its agents of duress, intimidation, and imposition by them, and other harrassments of plaintiff when sick; expressed in many forms and which, it is alleged, affected his conduct prejudicial to his rights. We find the proof utterly lacking in these respects; that there is no justification whatever in the record for any of these charges; and that, on the contrary, it is evident that the company, through its agents, was extraordinarily lenient in carrying the policies and in overlooking the defendant's failure to either pay, when due, the premiums or the obligations he had entered into to meet them; that such consideration by defendant and its agents rebuts, effectively, any reasonable inference that defendant sought to escape the burdens of the policy contracts.
>
> *We find specifically that there was no overreaching of the plaintiff in any way when, in December, 1926, and in March, 1927, he surrendered his policies and gave the several surrender notes in evidence;* and that each of such surrenders effectively and permanently terminated any responsibility to plaintiff from defendant, growing out of the several contracts theretofore subsisting." (Italics ours.)

and on page 136:

> "The testimony for the defense by Cornell leaves no foundation for a conclusion that the March 18 transaction was the result of duress."

The testimony of Mr. John D. Cornell of the district attorney's office, an impartial and disinterested witness, shows, beyond any reasonable doubt, that there was not

the slightest over-reaching of the plaintiff. His testimony was short and conclusive. He wrote to the plaintiff in his official capacity in 1927, when he was county detective. [Tr. 223.] He wrote two letters, one on March 7, 1927 [Defendant's Exhibit K, Tr. 223] and the other dated March 16, 1927 [Defendant's Exhibit L, Tr. 224]. Exhibit K reads:

"March 7th, 1927.

"Mr. James McCulloch, Jr., care of McCulloch Hospital, 914 Beech St., San Diego, California.

Dear Sir:

Please call at this office at your earliest convenience and ask for the undersigned.

Yours truly,

STEPHEN CORNELL,
District Attorney.
By Chief Investigator."

and Exhibit L reads:

"Mr. James McCulloch, Jr.,
Care of McCulloch Hospital
914 Beech St., San Diego, California.

Dear Sir:

Under the date of March 7th, I wrote you asking that you call at this office.

We have had no response from you and unless a response is made to this office personally a warrant will be issued for your arrest. This communication is final, and trust that you will take advantage of the opportunity that is given you.

Yours very truly,

STEPHEN CORNELL,
District Attorney.
By JOHN D. CORNELL,
Investigator."

These two letters were written on account of some checks, but the checks involved were those given to the nurses at the hospital by plaintiff when he was in charge of it. These checks had been turned over to Cornell of the district attorney's office by the nurses. [Tr. 224.] Cornell never had the $300.00 check in his possession in his official capacity. [Tr. 224.] Can this testimony be construed to support the statement of appellant

> "A postdated check for $300.00 and an additional note was given by him to the agent [Tr. 167], but he was unable to deposit available funds to meet the check. The check was placed in the hands of the district attorney and prosecution was threatened. As a final result Mr. McCulloch surrendered the policies to the agent for the defendant and a note for $339.39, dated April 19, 1927, payable to defendant's agent, was executed. [Tr. 169.]" (App. Op. Br. 7-8.)

Obviously not. It is also well to remember that these transactions between Cornell and the plaintiff took place in March, 1927, *after the policies had expired* and after two of the policies had been surrendered on December 30, 1926. Hence the alleged duress and overreaching of the plaintiff could not possibly have had any effect on the expiration of the policies. We feel, and the trial court felt, that contrary to the plaintiff's contentions, the defendant insurance company was extremely lenient with the plaintiff in carrying the policies and overlooking the plaintiff's failure to either pay when due the premiums or the obligations he had entered into to meet them, and that this leniency and consideration completely rebuts any inference that defendant is seeking to escape any just obligations to the plaintiff.

B. When did Mr. McCulloch, the Plaintiff, Become Permanently and Totally Disabled?

We concede that the plaintiff was sick in July, 1926, but the evidence plainly shows that he was not permanently and totally disabled from and after that date. Not only does the evidence justify the trial court's finding on that point, it compels it. Mr. McCulloch had received his policies and knew of the disability benefits provided for in each. Whether or not he knew of them as a fact, he is bound by knowledge of the contents of each as a matter of law.

Wyss-Thalman v. Maryland Casualty Co., 193 Fed. 55;
U. S. Casualty Co. v. Charleston etc. Co., 183 Fed. 238;
Madison v. Maryland Casualty Co., 168 Cal. 204;
Kahn v. Royal Indemnity Co., 39 Cal. App. 180.

Had he been permanently and totally disabled, he would have immediately put in his claim. The record shows that he was badly in need of money at that time. Why did he fail to claim the usually welcome disability benefits? The only answer is that he was not totally and permanently disabled. He still retained the policies in his possession until their surrender in December, 1926, and March, 1927. Yet during all this time he made no move to collect benefits in spite of his dire need of financial aid. The true date of his total and permanent disability is better shown by claims for disability presented by this same plaintiff to other insurance companies under policies similar to those issued by this defendant. During this same period of time plaintiff was carrying insurance with two other insur-

ance companies and to which he subsequently made application for disability benefits. The insurance he carried with these two other companies was in force before he bought insurance from the defendant. When he made application to them for disability benefits he did not claim he was disabled in 1926, but, on the contrary, in his application to the Metropolitan Life Insurance Company [Defendant's Exhibit E, Tr. 195], he stated that the date of injury or the beginning of the illness causing his disability was about April 10, 1927. [Tr. 196.] This was sworn to by Mr. McCulloch, the plaintiff, on June 13, 1927, and plaintiff's own doctor examined him and signed an affidavit stating that continuous and total disability commenced April 6, 1927. [Tr. 198.] This doctor's statement is Defendant's Exhibit F. [Tr. 197.] This medical testimony was produced at Mr. McCulloch's own expense and from his attending physician. Subsequently he made another application to the same company for total and permanent disability benefits which also contained a sworn statement that the beginning of the illness causing his present condition was April 20, 1927, also that he had quit work April 3, 1927, due to business reasons. [Tr. 200.] In plaintiff's notice and proof of disability claim to the Acacia Mutual Life Association [Tr. 209, 210], the truth of which was sworn to by himself, the plaintiff stated that he became totally disabled April 10, 1927. He testified that he filled in the blank himself. [Tr. 211.] The sworn statement of the attending physician, Doctor Pache, that accompanied the application contained the question and answer [Tr. 207]:

"10. At what date did total disability begin? (1) Since July 6, 1927, from personal observation at date first seen, but according to history of the case, since April 9, 1927, when he was confined to his bed."

In addition to all of this convincing evidence regarding the date of commencement of plaintiff's disability, we have plaintiff's own sworn statement made and sent to defendant, expressly intended to induce defendant's reliance thereon in allowing a reinstatement of the policies. This sworn statement is contained in plaintiff's application for reinstatement dated February 14, 1921. [Tr. 191 to 194, incl.] In said application it is stated:

"3. Are you in good health? Yes." [Tr. 192.]

and further [Tr. 193]:

"*I hereby certify that my health is not impaired;* that I have not consulted a physician during the past three years, except as stated above, *and I hereby declare that my answers to the foregoing questions are full, complete and true,* and are made for the purpose of inducing the Penn Mutual Life Insurance Company to comply with the request as stated in answer to Question No. 1 hereof, and it is understood and agreed that no liability on the part of the Penn Mutual Life Insurance Company shall arise under this health certificate until it has been approved at the home office of the company in the city of Philadelphia, Pennsylvania, and the premium has been paid, during my lifetime and good health. Dated at San Diego, this 14th day of Feb. 1927." (Italics ours.)

Plaintiff has sought to minimize the importance and significance of this last document by saying (App. Op. Br. 27):

> "There is not a syllable of testimony to indicate that McCulloch actually knew that he was affected with tuberculosis. His statement to Dr. Anderton, the insurance examiner, therefore, does no more than corroborate plaintiff's contention that he was then ignorant of the fact that the disability from which he was suffering was total and permanent. Such statement or admission proves nothing further."

We submit that no sane man operating a hospital and being around invalids all of the time could be totally disabled and not know it. It was not a question of knowing whether or not he was suffering from any particular illness. It was a question of his knowing whether or not he was totally and permanently disabled by bodily injury or disease from engaging in any occupation whatever for remuneration or profit [Tr. 48, 106]. Accompanying the application for reinstatement was a certificate of health from the medical examiner, Dr. Anderton [Tr. 194], showing that he had knowledge of the history of lobar pneumonia. This certificate shows that at the time of that examination for reinstatement, February 14, 1927, plaintiff's lungs were free from abnormalities and his heart and blood pressure were normal. This examination was made at the expense of the applicant [*i. e.* plaintiff, Tr. 220]. Doctor Herbert S. Anderton was called as a witness and his testimony alone justifies the trial court's finding that plaintiff was not totally and permanently disabled while the policies were in force. This witness is a man who specialized in pulmonary tuberculosis at the California Sanitarium at Del Mar, California. [Tr. 218.] He was on the tubercular consulting board in France for a year, where he did nothing but chest work. He knew

plaintiff from the time he took over the hospital, which was for a good many years. [Tr. 218.] His impression of Mr. McCulloch's condition at the time he examined him upon Mr. McCulloch's own application for reinstatement of his insurance was that Mr. McCulloch had completely recovered from the lobar pneumonia which he had had in July, 1926. [Tr. 218.] *"His condition was perfectly healthy."* After Mr. McCulloch was up and around and had recovered from his pneumonia and had returned from the hospital, Doctor Anderton saw him nearly every day performing his usual duties, and at the time when Doctor Anderton examined him he was still performing his usual duties and maintaining that he was in perfect health. [Tr. 219.] He examined the X-ray plates offered in evidence by the plaintiff and found that they showed fluid at the base of the lung, some fibroid deposit at the apices with calcareous deposits, which is something found in many supposedly normal individuals. [Tr. 219.] His diagnosis from the X-ray plates was an unresolved pneumonia with fluid. This doctor had received from Mr. McCulloch a definite history of the lobar pneumonia which the plaintiff had suffered in July, 1926, and because of those facts made a careful examination of his chest. His findings by reason of that examination were negative: otherwise he would not have recommended a reinstatement of the policy. At the request of the court, the doctor answered numerous questions concerning tuberculosis relative to his examination of the X-ray plates and stated that he did not see any signs of an active tuberculosis [Tr. 221], and, after having looked at the X-ray plates and having read Doctor Kinney's report (the man who took the X-rays), stated that there was not an active tuber-

culosis existing. [Tr. 222.] In fact, going through all of the doctor's testimony, the condition which he found when he examined the man for reinstatement was that the man was well and normal. In going over the clinical reports of the year 1926, he found nothing to indicate tuberculosis any more than would indicate pneumonia with effusions.

In seeking to avoid the effect of this damaging evidence, counsel for plaintiff argue (App. Op. Br. 26):

> "Dr. Anderton's testimony, however, failed utterly to withstand the test of cross-examination. He testified that although he saw no indication of active tuberculosis, he had no X-ray findings or other proper examination to determine this question. [Tr. 219.] He also testified that the examination given the plaintiff at that time was an ordinary life insurance examination, no other examination being made. [Tr. 220.]"

This does not truly state the situation. Doctor Anderton's testimony, appearing on page 220 of the transcript, states:

> "I examined him for life insurance previous to that time, but not as to his physical condition from the standpoint of a patient. At the time he took out the Penn Mutual policies. That was in the fall of 1925. I gave him the ordinary life insurance examination. Aside from those, I made no other examination. Because of the history given me I made a careful examination of Mr. McCulloch's chest when he gave me the definite history of lobar pneumonia that he had in July, 1926. My findings of that examination were negative, otherwise, I would not have recommended a reinstatement of his policies."

In view of this type of examination having been made, was it necessary for a doctor specializing in pulmonary tuberculosis to have X-rays to be able to tell whether or not the applicant was totally and permanently disabled from that disease? If we adopt the plaintiff's definition of "total and permanent disability," are any of us not permanently and totally disabled? If it takes an experienced specialist with X-rays to tell whether or not total and permanent disability exists, we may all be running around permanently and totally disabled and utterly unconscious of it. Even the plaintiff himself thought that he was at that time in good health [Tr. 191] until years later, when his righteous indignation was aroused by having to pay a just debt, the note executed to Don Carrell in March, 1929 [Tr. 170], then he started to figure out a method of retaliation and decided to press this alleged claim.

We submit that the foregoing evidence not only justified the trial's court's finding that plaintiff was not permanently disabled while the policies were in force, but that it compels that conclusion.

To briefly summarize the evidence supporting the finding attacked, we find:

(1) Plaintiff's sworn statements in his written applications to both the Metropolitan Life Insurance Company and the Acacia Mutual Life Association fixing the date of commencement of his total and permanent disability as of sometime in April, 1927. It is obvious that the sole purpose of fixing his disability as against our client as commencing in 1926 was to obtain the benefit of the policies involved in this action. He could not fix the disability in regard to these policies as of the date when he fixed

it regarding the Metropolitan and Acacia policies and hope to recover from the defendant in this case.

(2) His written application for reinstatement dated February 19, 1927 (Defendant's Exhibit D). In this document he stated under oath that he had fully recovered from his previous illness, and that he was in good health at that time.

(3) The report of Doctor Anderton, the tubercular specialist who examined him on his application for reinstatement (Defendant's Exhibit H), and certified that he was in good health.

(4) The testimony given by Doctor Anderton at the trial relative to the examination of X-ray plates made in court which, in his opinion, did not show active tuberculosis when these plates were taken in July, 1926.

Counsel for plaintiff to support their claim that there was no evidence to show that plaintiff was not totally and permanently disabled, have cited numerous state court decisions showing what jury and trial court findings as to total disability will not be reversed. We are certain that the evidence just discussed shows that plaintiff was not totally and permanently disabled irrespective of what definition of total and permanent disability is adopted. The trial court found that the plaintiff was not totally and permanently disabled. If there is any substantial evidence to support his findings, that is all there is to it. Unquestionably every case of alleged total and permanent disability must rest upon its own facts. It is true, as appellant contends, that a man may be permanently and totally disabled although he does some work and attends

to some business, which in all probability his physician does not recommend. However, we submit that in the case before Your Honors there was sufficient evidence to support the finding that plaintiff had completely recovered from his illness of the early part of 1926 and was in good health at the end of that year. None of the cases cited by appellant hold or imply that a man in good health is totally and permanently disabled. A further citation of cases on this point is unnecessary. However, we might in this connection refer to the case of *Prudential Insurance Company of America v. Wolfe,* 52 Fed. (2d) 537 (C. C. A. 8th), where the court lays down the rule to be followed where an insurance policy defines total and permanent disability in terms substantially the same as those used in the policies before Your Honors. In that case the insured tested out several different jobs before finally quitting altogether. The court stated (541):

> "There is no ambiguity as to the measure provided to determine the disability or incapacity insured against. That measure is inability wholly, continuously, and permanently to perform any work for any kind of compensation of financial value. There is therefore no ground for construction. Commonwealth Casualty Co. v. Aichner (C. C. A.) 18 F. (2d) 879."

and held that evidence that insured engaged in various forms of employment, as a matter of law, prevented recovery under a policy measuring disability by total inability to perform any work for compensation. In the

case before Your Honors there was evidence which, if believed, would show plaintiff's ability to engage in some occupation (in fact in any occupation) for remuneration or profit at the time the policies were surrendered.

The case of *Pilot Life Ins. Co. v. Owen*, 31 Fed. (2d) 862, at page 864 (C. C. A. 4th), involved evidence practically identical to that before Your Honors. There the court stated:

> "Nevertheless, plaintiff claims that the evidence on the question of disability is entirely ample to show that the insured was not only disabled on December 12 and October 1, 1926, but even before July 1, 1926, when the last regular premium became due; in fact even as far back as the early spring of that year. But we do not find this to be borne out by the testimony. The insured was in poor health for some months previous to his death, but as late as December 14, 1926, that is, within a month of his death, he was actively conducting his business and continued to supervise the prosecution of work under various building contracts he had made, and which sometimes required him to travel to nearby towns. Therefore we are forced to conclude that no such disability existed as would have entitled the insured to the benefit of this particular provision of the policy. A partial, noncontinuous disability was not sufficient. One is not deemed totally disabled unless he is no longer able to do his accustomed task and such work as he has been trained to do, and upon which he must depend for a living. Metropolitan Life Insurance Co. v. Bovello, 56 App. D. C. 275, 12 F. (2d) 810, 51 A. L. R. 1040."

III.

Submission of Proof of Total and Permanent Disability Was a Condition Precedent to the Waiver of Premiums and Payment of Disability Benefits.

Let us assume (but not concede) for the consideration of this point that plaintiff was actually totally and permanently disabled during the period covered by the insurance policies in question. There can still be no recovery by the plaintiff because no proofs of disability were submitted while the policies were in force. All three of the policies involved in this case made the submission of proofs of total and permanent disability before lapse for non-payment of premium a condition precedent to waiver of premium and payment of disability benefits. In this connection it may be well to note that policy C provided for waiver of premiums but no monthly payments in cash. Section 4 of polices A and B provides, in the first paragraph [Tr. 56, 85]:

> "Said income shall start upon the date of receipt by the Company at its Home Office during the insured's lifetime of due proof of total and permanent disability and continue thereafter for the period of the said total disability;

and in the second paragraph [Tr. 56, 85]:

> "*The Company will waive the payment of any premium falling due after receipt of due proof of total and permanent disability* and during the continuance of the said total disability of the insured." (Italics ours.)

and in the sixth paragraph [Tr. 57, 86]:

> "Immediately upon receipt of due proof of such total and permanent disability, the benefits shall become effective. * * *"

and in the ninth paragraph [Tr. 58, 87]:

> "This provision for Total and Permanent Disability Benefits shall automatically terminate:
>
> (1) Upon default in the payment of any premium;
>
> (2) If this Policy be surrendered for its cash value * * *."

In section 4 of policy C it is provided, in the first paragraph [Tr. 114]:

> "If the insured shall become totally and permanently disabled before the policy anniversary on which the age of the insured at nearest birthday is sixty years, the Company *will waive the payment of any premium falling due after receipt by the Company at its Home Office during the insured's lifetime of due proof of total and permanent disability.* * * *" (Italics ours.)

and in the fifth paragraph [Tr. 115]:

> "Immediately upon receipt of due proof of such total and permanent disability, the benefits shall become effective, subject to the conditions herein provided."

and in the eighth paragraph [Tr. 116]:

> "This provision for Total and Permanent Disability Benefits shall automatically terminate:
>
> (1) Upon default in the payment of any premium:
>
> (2) If this Policy be surrendered for its cash value * * *."

From these provisions it is clear that under no circumstances would plaintiff have been entitled to any disability benefits under any of the policies until he had filed proof of his total permanent disability at the home office of the

company, and expressly, by the terms of the policies themselves, the benefits were to begin only upon receipt of due proof of total and permanent disability. These provisions for disability are not self-executing. The plaintiff first asked to submit proofs of his disability in March, 1929. This was two years after the surrender of policy A and over twenty-seven months after the date on which policies B and C had lapsed for non-payment of premiums. Therefore, all benefits had ceased in accordance with the terms of the policies providing for automatic termination of disability benefits upon default in payment of any premium or upon the surrender of the policy. It is a well-settled rule of law that prompt payment of premiums in insurance policies is essential and provisions for such payment are a part of the contract and are conscionable, valid and enforceable, and without it the insurance business could not be carried on.

> *Thompson v. Knickerbocker Life Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765;
>
> *Klein v. New York Life Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662;

As was stated by the 5th Circuit Court, the parties are entitled to make their own contract, and the business of life insurance companies is conducted on the theory that premiums will be promptly paid at the time when they are due, and if it were otherwise it would cause untold confusion.

> *McCampbell v. New York Life Insurance Co.*, 288 Fed. 465 (5th Cir.), *certiorari* denied, 262 U. S. 729;
>
> *Sellers v. Continental Life Insurance Co.*, 30 Fed. (2d) 42 (4th Cir.);

and in *Long v. Monarch Accident Insurance Co.*, 30 Fed (2d) 929 (4th Cir.), the court stated:

> "We start with the general principle that in the absence of special agreement failure to pay an insurance premium when due *ipso facto* forfeits the policy."

In *New York Life Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789, our Supreme Court stated:

> "It must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it was enforceable the business would be thrown into utter confusion."

A further citation of authorities on this point seems useless. It has been held by the United States Supreme Court and by numerous state courts that provisions such as those involved here do not save the policy from lapse by reason of non-payment of a premium at a time when a disability existed, where proof thereof had not been furnished by the insured. The case of *Bergholm v. Peoria Life Insurance Company*, 284 U. S. 489, 76 L. Ed. 306, plainly and emphatically lays down the rules of law that are applicable to the case before Your Honors. The appellant has sought to distinguish this case on many grounds, all of which are more illusory than real. Appellant states (App. Op. Br. 46):

> "It is entirely possible that the respondent may seek some comfort from this decision."

We do not consider it a question of comfort. It is a question of *stare decisis.* In that case the policy provided (307):

> "*Upon receipt by the Company of satisfactory proof that the Insured is totally and permanently disabled as hereinafter defined the Company will*
>
> "1. *Pay for the Insured all premiums becoming due hereon after the receipt of such proof and during the continuance of the total and permanent disability of the Insured* * * *." (Italics ours.)

We submit that the only possible distinction between this provision and those before Your Honors is that that provision used the word "pay" instead of "waive," the practical result being the same. The Supreme Court, in discussing the *Marshall* case, stated (308):

> "*In that view, the obligation to furnish proof was no part of the condition precedent to the waiver; but such proof might be furnished within a reasonable time thereafter. Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of proof of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums becoming due after the receipt of such proof. The provision to that effect is wholly free from the ambiguity which the court thought existed in the Marshall policy.*" (Italics ours.)

Note the language "the ambiguity which the court thought existed in the Marshall policy." In the case before Your Honors no court could have "thought" any ambiguity existed; nothing could be plainer than the language [Tr. 56]:

> "Waiver of Premium. The Company will waive the payment of any premium falling due after receipt of due proof of total and permanent disability and during the continuance of the said total disability of the insured."

The court further stated the well-settled rule (308):

> "It is true that where the terms of a policy are of doubtful meaning, that construction most favorable to the insured will be adopted. Mutual L. Ins. Co. v. Hurni Packing Co., 263 U. S. 167, 174, 68 L. Ed. 235, 238, 31 A. L. R. 102, 44 S. Ct. 90] Stipcich v. Metropolitan L. Ins. Co., 277 U. S. 311, 322, 72 L. Ed. 895, 900, 48 S. Ct. 512. This canon of construction is both reasonable and just, since the words of the policy are chosen by the insurance company; but *it furnishes no warrant for avoiding hard consequences by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings.*" (Italics ours.)

Appellant makes the extremely interesting observation regarding the *Bergholm* case (App. Op. Br p. 46):

> "It is to be noted that in the Bergholm case no equitable excuse was offered for failure to give the notice required by the terms of the policy."

Appellant, however, unwarrantedly assumes that they have offered a valid, equitable excuse for failure to give the notice required. Even had they done so, the Supreme Court in the *Bergholm* case covered and answered that argument, stating on page 308:

> "As long ago pointed out by this court, the condition in a policy of life insurance that the policy shall

> cease if the stipulated premium shall not be paid on or before the day fixed is of the very essence and substance of the contract, *against which even a court of equity cannot grant relief.* Klein v. New York L. Ins. Co., 104 U. S. 88, 91, 26 L. Ed. 662, 663; New York L. Ins. Co. v. Statham, 93 U. S. 24, 30, 31, 23 L. Ed. 789, 791, 19 Am. Rep. 512; Pilot L. Ins. Co. v. Owen (C. C. A. 4th) 31 F. (2d) 862, 866. And to discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent to the granting of such relief by the insurer, would be to vary the plain terms of a contract in utter disregard of long settled principles." (Italics ours.)

In particular note "against which even a court of equity cannot grant relief." Considering the case as a whole and analyzing each portion, we find that it still remains an unsurmountable obstacle in the path of appellant's hope for recovery. It is a square authority for the position taken by the trial court in the instant case and for respondent's case here before Your Honors. Numerous state courts have adopted this same rule in construing similar provisions in insurance policies.

The Circuit Court for the 4th Circuit in *Pilot Life Insurance Co. v. Owen,* 31 Fed. (2d) 862, was dealing with a very similar case. That case involved a policy containing very similar provisions to those before Your Honors. No proofs of disability were ever furnished the company, nor was any claim presented until after the death of the insured. The plaintiff in that case claimed that the insured was disabled before the last regular

premium became due. While the court stated that the evidence did not so show, it went further and held that for the disability benefit to be operative, there must be not only satisfactory proof given to the company of total continuous disability of the insured, but that also the insured must submit written request that the company waive payment of premiums as they become due, meaning not those in default but those subsequently to become due. The lower court gave judgment against the life insurance company, which was reversed by the Circuit Court.

In *Courson v. New York Life Insurance Co.*, 295 Pa. 519, 145 Atl. 530, the policy provided for waiver of payment of premiums "hereafter becoming due" if the insured "shall furnish proof to the company that he has become totally and permanently disabled by bodily injuries or a disease." After paying one annual premium the insured became mentally deranged and hence disabled. He made no claim at the time and for seven years thereafter paid all premiums falling due. He died and his administratrix brought suit for recovery of the seven annual premiums paid during the insanity of the insured. The court held that the administratrix could not recover, stating:

> "We do not regard the giving of notice of disability as a condition subsequent but as a condition precedent. It is so by the very terms of the policy. The company was to only waive the premiums and endorse the waiver on the policy *if the policyholder had furnished proof satisfactory to the company of his disability*. It was the judge of the proofs. The requirement of notice of disability before the company acted was a salutary one. It enabled the com-

pany to investigate before waiving payment of the premiums and guarded it against malingerers and frauds." (Italics ours.)

It is to be noted that in the policies before this court the provisions setting forth that disability benefits were to begin only after receipt of due proof of disability are much clearer than those in the Pennsylvania case.

In *Illinois Bankers Life Association v. Byassee*, 275 S. W. 519 (Ark.), the life insurance policy lapsed nearly eight months before the death of the insured, and the court held that the insured was bound to ascertain whether or not she was permanently disabled within the meaning of the policy and give notice within the time stipulated in the policy (before lapse for non-payment of premiums) in order to recover on such a claim.

New England Mutual Life Insurance Co. v. Reynolds, 116 So. 151 (Ala. 1928), is another square authority for the holding of the trial court. In this case the insured became disabled by insanity during the period covered by the policy. The policy lapsed for non-payment of premiums. Two years later the beneficiary brought suit for the proceeds of the policy, claiming that since the insured in fact became disabled while the policy was in force, the company was bound to waive all premiums thereafter falling due, even though no proofs of total disability had been submitted by the insured or by anyone on his behalf. The Alabama court held the defendant not liable and sustained the principle that receipt of due proof of disability was a condition precedent to the liability of the company, stating:

"We are of the opinion that furnishing proof of disability to the insurance company is made a condition precedent to the waiver of premium payments under the supplemental agreement set out in the special plea above. This agreement declares: 'If the insured shall furnish due proof to the company at its home office in the city of Boston that he has become totally disabled by bodily injury or disease the company will waive payment of each preium as it thereafter becomes due during the continuance of disability.' Intervening clauses name the conditions under which such benefits are allowed and define the character of disability. They must all concur, to make the waiver effective, that the furnishing of proof is the specific condition upon which the company 'will' waive each premium 'thereafter' to become due. 'Thereafter' clearly refers to the date of furnishing proof. The clause is in no way ambiguous or devoid of meaning.

"The entire structure of the agreement negatives the idea of a self-operating waiver in the event of total disability which embodies a contractual obligation of the company to waive premiums when 'due proof is furnished.' Manifest reasons appear for thus limiting the agreement. The premium named in the policy of life insurance is the consideration for the contract. Its prompt payment is the life of the business. By the contract the renewal premium carries protection to a fixed date. Unless renewed by another stipulated premium it lapses and the rights of the insured are measured by the non-forfeiture provisions—usually certain options for cash surrender value, paid-up insurance, or extended term insurance. * * *

"This case will illustrate the conclusion that may result that a policyholder still has a policy in force

> by reason of the waiver of premiums without any notice thereof to the insured."

In *Wick v. Western Mutual Life Insurance Company*, 175 Pac. 953 (Wash. 1918), the terms of the policy were substantially the same as those in the case at bar. The insured became disabled while the policy was in force, but made no claims for benefits until after the policy had lapsed for non-payment of premiums. The Supreme Court held that proof of disability should have been submitted to the company on or before the date when the payment fell due.

In *Jones v. New York Life Insurance Co.*, 290 Pac. 333 (Wash.), the insurance company had received letters in which it was informed that the insured was or had been ill. The company paid some of the benefits and then undertook to recover them. The Supreme Court of Washington in that case held that the insured was not entitled to total and permanent disability benefits for any period preceding the presentation of the proofs of the insured.

In *Brams v. New York Life Insurance Co.*, 299 Pa. 11, 148 Atl. 855, the policy contained a provision:

> "Upon receipt at the company's home office, before default in payment of premium, of due proof that the insured is totally disabled, as above defined, and will be continuously so totally disabled for life * * * the following benefits will be granted."

Before lapse in payment of premium the insured's sister wrote the company that the insured was sick and would pay his premium as soon as he recovered. No notice

of disability was furnished and the premium was never paid. The insured died and a claim was made on his policy. The Pennsylvania Supreme Court held that the letter written by the insured's sister was not a compliance with the provisions of the contract, and that the insured and his beneficiary were bound to have made the proof prior to default.

In *Hanson v. Insurance Co.*, 229 Ill. App. 15, it was held (quoting from the syllabus):

> "Where a life policy provides for the waiver of premiums during * * * until disability * * * upon the furnishing * * * of proof * * * of such disability and the endorsement thereby by the insurer on the agreement and * * * the insured was disabled five days before his premium was due and died after the due date without payment thereof or without making any proof of disability, there could be no recovery on the policy."

As against these well-reasoned and firmly established authorities, we find several cases cited by appellant, practically all of which are from Kentucky and Texas (two jurisdictions noted for their ultra liberal doctrines). The *Marshall* case and other cases cited by appellant are easily distinguished from the instant case on at least two different grounds: The first is stated in the *Marshall* case at page 979 (App. Op. Br. p. 45):

> "*A construction making the disability benefits to begin as of the time of proof might be all right where such benefits are sought while the insured is living, but a disability provision such as the one to be construed where the disability occurs near the due date of the premium and continues until death, is made*

worthless by holding that the proof of disability and not the disability itself, makes it operative." (Italics ours.)

and, second, in all of appellant's cases proof of disability within a reasonable time is required.

In the case before Your Honors the insured is still alive. Proof of disability was submitted over three years after the alleged disability commenced and two years after applications were made for disability benefits from the Acacia and Metropolitan insurance companies. At the outset it might be well to note that practically all of the cases cited by appellant, like the *Marshall* case, involved the death of the insured and submission of proofs of disability within a very short time thereafter.

The case of *Minnesota Mutual Life Insurance Co. v. Marshall*, 29 Fed. (2d) 977 (App. Op. Br. 41), is easily distinguished from the case at bar on its facts. The premium fell due on October 14, 1926. There was a grace period of thirty days, which continued the policy in force to and including November 14, 1926. Plaintiff was operated on for appendicitis November 16, 1926, and died November 29th. The jury found he had become totally and permanently disabled prior to November 14, 1926. Between the dates when the policy was in force, November 14th, and November 29th, the date of his death, a period of fifteen days elapsed, while in the case at bar, aopting plaintiff's own theory, a period of three years elapsed. We do not believe the above court, or any court, would or could have made the same ruling had three years elapsed instead of fifteen days. In regard to this situation the court stated (978):

"On the question of when the time of waiver of the payment of premiums begins under the policy provisions similar to those quoted, *there are two lines of decisions, one holding that proof of disability fixes the time when the waiver begins, and the other holding that the time of waiver is the time of disability and that a reasonable time thereafter is allowed to make proof of such disability*, and that if death occurs before the proof of disability is made, although after the due date of the premium, the insurance company is liable where the disability arises before the due date of the premium and continues until death." (Italics ours.)

and also the statement quoted *supra*.

Southern Life Insurance Co. v. Hazard, 148 Ky. 465, 146 S. W. 1107 (App. Op. Br. 46), is also cited. In this case also the insured died and proofs were furnished within a reasonable time, *i. e.*, within seven weeks.

Merchants Life Insurance Co. v. Clark (Tex. Civ. App.), 256 S. W. 969 (App. Op. Br. 48), is also cited. The facts in this case show that there was a failure to present proof within thirty-five days, as distinguished from the case before Your Honors, where the failure to present proof continued for three years. And, again, in this case the insured died.

The next case cited is *Missouri State Life Insurance Co. v. LeFevere* (Tex. Civ. App.), 10 S. W. (2d) 267 (App. Op. Br. 49). Here the assured's premium was due April 8, 1927. He became disabled February 20, 1927, and died June 6th of that year. The lapse of time from the date of default to the date of death was fifty-eight days. The court stated in its opinion (269):

> "We also think under the circumstances of this case that a duty rested upon anyone to make the proof within a reasonable time after the same could be made, and that the offer of appellee to make such proof on June 17, 1927, after the death of the assured on June 6, 1927, was within a reasonable time after the same could be made."

In this case, in spite of so short a time, namely, fifty-eight days, we note that the court apparently justified its decision on the fact that the assured was under both a mental disability and a physical disability, which made him unable to give a notice of disability or present a claim. In the case before Your Honors there was no such disability existing. While it may be true that the pneumonia and pleurisy kept Mr. McCulloch in his bed for some time, the evidence is clear that he was up and about the hospital when he returned to it until the time he went out of business. The evidence was clear that he found time enough to file a claim with two other insurance companies stating that his disability commenced as of a date different than the date presented in this case; and, further, he then, after submitting proofs to those companies, waited two years and more before making any claim upon the defendant here.

The next case cited is *Metropolitan Life Insurance Co. v. Carroll* (Ky.), 273 S. W. 54 (App. Op. Br. 51). Here the assured's premium became due June 27, 1923, with a grace period of thirty-one days. The assured became totally and permanently disabled July 19th and died July 30th of that year. Here again is a trivial lapse of time of a mere seventeen days and the court, in its

decision, relies upon the physical disability of the assured to present a claim or make proof. Note that this is also a death case.

On page 52 of appellant's opening brief we find the case of *Fidelity Mutual Life Insurance Co. v. Gardner's Administrators*, 233 Ky. 88, 25 S. W. (2d) 69. In this case permanent and total disability occurred within the grace period after the unpaid premium fell due. Notice of death, etc., was given two weeks after the grace period expired. The court stated:

> "Three days after the death his administrator offered to prove his prior disability and death. Clearly this was within a reasonable time."

The lapse of time here was trivial and the court emphasized the fact that the disability occurred within the grace period and that proof thereof was made within a reasonable time. This case, too, was a death case.

The next case cited is *Bank of Commerce & Trust Co. v. Northwestern National Life Insurance Co.* (Tenn.), 26 S. W. (2d) 135 (App. Op. Br. 53). In this case there was but a lapse of nine days prior to the filing of the claim, and this case also involved the death of the assured.

The next case is *Mid-Continent Life Insurance Co. v. Hubbard* (Tex.), 32 S. W. (2d) 701 (App. Op. Br. 53). Here there was a lapse of approximately fourteen days and the court discussed the insured's physical disability to present his claim. This, too, was a death case.

The next case is *Inter-Southern Life Insurance Co. v. Hughes' Committee*, 224 Ky. 405, 6 S. W. (2d) 447

(App. Op. Br. 55). This case is out of point. It involved a question of insanity and the fraudulent act of an insurance company in taking up an insurance policy of an insane insured.

The next case is *Levan v. Metropolitan Life Insurance Co.,* 138 S. C. 253, 136 S. E. 304 (App. Op. Br. 56). Here the premium fell due June 5, 1923. The grace period of the policy extended it to July 5th of that year. The insured was insane when the premium fell due in June and was sent to an insane hospital late in the year. He died January 12, 1924. The claim was made within six months after the insured was permanently and totally disabled, and more noteworthy is the fact that the court found that by reason of his condition, the insured was not able to give notice to the company. In spite of the majority opinion, there is a well-considered dissenting opinion quoting numerous authorities to the contrary. We submit that the facts in this case are much different from those in the case at bar, especially in that the time within which the notice was given was at least reasonable, and here, too, was a death case.

Appellant cited *McColgan v. New York Life Insurance Co.,* 36 Ohio. App. 123, 172 N. E. 849 (App. Op. Br. 56). Here notice of disability and death was given to the company within six months after the default, and this also was a death case.

The next case cited is *State Life Insurance Co. v. Fann* (Tex.), 269 S. W. 111 (App. Op. Br. 57). The insured became disabled April 1, 1922, by reason of insanity. The premium note he had given fell due June 20th of that year. He died November 6, 1923. The insured,

being insane, was under a mental disability which prevented his making proof. This was a death case, and the lapse of time was much less than that in the case before Your Honors. There is no claim that Mr. McCulloch was physically unable to sign or present the proof of disability at least as early as the time when he performed similar acts in respect to the Metropolitan and Acacia policies, at which time he knew of his condition.

Appellant also cites *Hageman v. Equitable Life Assurance Society* (Ky.), 282 S. W. 112 (App. Op. Br. 59). Here the assured became permanently and totally disabled June 5, 1923. The premium fell due September 1st of that year. He gave a report on July 15, 1923, of his illness, but defined it as partial disability. The court held, however, that the information was in the hands of the company as to disability, and even though the assured had classed it as partial, it was, as a matter of law, total. We do not consider the case applicable to the facts in the case at bar.

Aetna Life Insurance Co. v. Palmer, 159 Ga. 321, 125 S. E. 829 (App. Op. Br. 60), is cited. This case, however, is not in point and does not involve the question of giving any notice. The question involved was whether or not plaintiff could recover if he became totally and permanently disabled during the grace period of the policy.

Hawthorne v. Travelers Protective Assn., 112 Kan. 356, 210 Pac. 1086 (App. Op. Br. 61), does not involve any of the questions involved in the instant case. It concerns a health and accident policy. There was no

default in the payment of any premium and there was no question of waiver of premium involved.

The other cases cited by appellant are not even claimed to be applicable.

We submit that even a cursory examination of the cases just discussed shows that they are all cases involving the death of the insured and cases where the insured, by reason of his disability or death, was prevented from making proof of claim, and most striking of all is the language of the court in most of them that proof was made within a *reasonable time*. In discussing these cases we have not attempted to go into the language of the policy in each, but have discussed the cases upon the merits as brought forth by the facts involved. The provisions in many of the policies involved in those cases were entirely different from those before Your Honors, and we submit that in this case proof of disability should have been furnished while the policies were in force.

IV.

Plaintiff's Cause of Action Is Barred by Plaintiff's Laches.

Independent of other reasons why plaintiff cannot recover in this case, we find that defendant was greatly prejudiced by the laches of plaintiff in the presentation of his claim. Laches, to bar relief, imputes some degree of fault. It is certain that at least as far back as August, 1927, when plaintiff made proof to Metropolitan and Acacia, he knew his condition. We contend that, even if it could be construed that the lapsed and surrendered policies could have been construed to be in force at that

time, both in law and in fact he knew their provisions. The law is clear that parties are held to a reasonable degree of diligence in learning of, as well as enforcing, their rights, and negligence is no excuse for ignorance.

Tarke v. Bingham, 123 Cal. 163.

In *Ater v. Smith*, 243 Ill. 57, 91 N. E. 776, the court stated:

> "Persons cannot close their minds to every avenue of information and knowledge, benumb acquisitive instinct with indifference and subsequently expect courts to relieve them from their self-imposed ignorance."

In *Broaddus v. Broaddus*, 144 Va. 727, 130 S. E. 794, it was stated:

> "The test is not what the plaintiff knows, but what he might have known by the use of the means of information within his reach with the vigilance the law requires of him."

In *Scranton Gas & Water Co. v. Lackawanna, etc., Co.*, 167 Pa. 136, 31 Atl. 484, it was stated:

> "Three years now is longer in events and progress than twenty years some centuries ago, when the statutes of limitation were adopted in England."

Note:

Williams v. Woodruff, 36 Colo. 28, 85 Pac. 90, holding that the disadvantage resulting from delay may come from a variety of causes, including the death of parties or witnesses.

See, also:

Hammond v. Hopkins, 143 U. S. 224;
Kleinclaus v. Dutard, 147 Cal. 245.

Plaintiff will undoubtedly argue that the defendant has had the use of the money which it would have been paying plaintiff if plaintiff had acted promptly. However, we submit that if plaintiff had acted promptly, the defendant could have made an investigation of the facts and further physical examinations could have been made of the plaintiff to determine what his true condition was. Further examination might have disclosed what Dr. Anderton found when he examined Mr. McCulloch in February, 1927, and a score or more doctors who could have made such investigation and examination might well have been before the trial court to testify as to what they found. At least they could have learned the true facts. The record in this case also discloses that Don Carrell, the one material witness for the defendant upon the matter of the notes and checks, was actually upon his deathbed when the case was tried [Tr. 228].

The plaintiff, by his delay in bringing this suit, has made it practically impossible for the defendant to prepare a complete and unambiguous defense. Equity regards stale claims with disfavor and long lapse of time unexplained. Even one year, of itself not a bar to relief under the statute of limitations, operates by way of evidence against the justice of the right asserted. It not only subjects plaintiff's case to more severe criticism and scrutiny than it would otherwise receive, and exacts of him a higher degree of proof than would otherwise be required, but moves the court to look with more indulgence on the evidence adduced by the defendant. This

is the rule in both the federal courts and in the California courts.

> *Pond Creek Coal Co. v. Hatfield*, 239 Fed. 622;
> *Updike v. Mace*, 194 Fed. 1001;
> *Elliott v. Bunce*, 10 Cal. App. 741.

Regardless of the other defenses established by the defendant, we submit that the laches of plaintiff alone should bar his recovery.

Conclusion.

A review of the facts of this case and the law applicable thereto discloses that the conditions in the policies involved make submission of proofs of total disability before a default in payment of premium a condition precedent to recovery. A review of the precedents discloses that the more enlightened courts everywhere hold that unless such proofs are submitted while the policy is in force, the insured or his estate or beneficiary cannot recover. The few remaining decisions are uniform in holding that proof of disability must be submitted within a reasonable time, and no case has been cited where the lapse of time after the alleged disability consisted of more than six months. The record in this case clearly shows that defendant was greatly prejudiced by the delay of the plaintiff in presenting his claim.

We therefore respectfully submit that the judgment of the trial court should be affirmed.

ROBERT DECHERT ESQ., and
O'MELVENY, TULLER & MYERS and
J. R. GIRLING and
L. M. WRIGHT,
Attorneys for Appellee.

No. 6891

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

HENRY K. PERSONIUS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Transcript of the Record

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

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STRAWN & CO., INC., PRINTERS, BOISE, IDAHO

PAUL P. O'BRIEN,
CLERK

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

HENRY K. PERSONIUS,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Northern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

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In the District Court of the United States, for the District of Idaho, Southern Division.

HENRY K. PERSONIUS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 1676

COMPLAINT

Filed December 10, 1931

COMES NOW, The plaintiff in the above entitled action and complaining of the defendant alleges as follows, to-wit:

First Cause of Action

I.

That the plaintiff herein is now a resident and citizen of Boise, County of Ada, State of Idaho, in the Southern Division of the District of Idaho.

II.

That this action is brought under the War Risk Insurance Act of October 6, 1917, and the World War Veterans Act of June 7, 1924, and amendatory acts, and is based upon a policy or certificate of insurance issued under said acts to the plaintiff by the defendant.

III.

That on the 16th day of June, 1916, the plaintiff enlisted for military service in the United States Army and served as a member of said United States Army continuously until he was honorably discharged from said United States Army on the 27th day of February, 1920.

IV.

That while in the said United States Army, and during the period between his said enlistment, and his honorable discharge as aforesaid, this complainant, desiring to be insured against the risks of war, and on or about November ...., 1917, applied for a policy of war risk insurance in the sum of Five Thousand ($5,000.00) Dollars, and at the time of said application authorized the deduction from his service pay of all premiums that might become due thereon, and thereafter there was deducted from his monthly pay certain sums of money as premiums for said insurance to and including the month of February, 1920.

V.

That a certificate of war risk insurance was duly issued by the terms whereof the defendant agreed to pay the plaintiff $28.75 per month in the event that he suffered total and permanent disability, but that no policy of insurance was ever delivered to the plaintiff, and said certificate has been lost.

VI.

That while this plaintiff was in the military service of the United States as aforesaid and during the World War, and subsequent to the effective date of said insurance, and while said policy was in full force and effect, this plaintiff on October 31, 1918, while engaged in armed combat with the armed forces of the Central Powers, was wounded by being struck in the left leg by a fragment of high explosive shell, which caused a destruction of bone substance in the tibia and fibula, a contracture of the plantar tendon, a shortening of the left leg, an atrophy of the left leg, an infection of the left leg, and osteimyolitis of the bones of the left leg, and the plaintiff has continuously suffered from and been afflicted with said injuries and diseases from October 31, 1918, and this plaintiff is informed and believes, and upon information and belief alleges the fact to be that as a result of said injuries and diseases the said plaintiff became and was, on October 31, 1918, and during the time said insurance was in full force and effect, totally disabled, and that such total disability was founded

upon conditions which made it reasonably certain that it would continue throughout his life and that he was totally and permanently disabled from October 31, 1918, until January 1, 1929. That by reason thereof he became entitled to receive from the defendant the sum of $28.75 per month from October 31, 1918, to January 1, 1929.

VII.

That heretofore and upon the 4th day of February, 1931, this plaintiff demanded of the defendant in writing payment of the benefits of said war risk insurance, and on said date filed with the United States Veterans Bureau a written claim for said war risk insurance, but said defendant and said United States Veterans Bureau and the Director thereof have disputed and disallowed the claim of this plaintiff and have failed and refused and now fail and refuse to make payments thereunder, and that said claim was denied by defendant on the 5th day of December, 1931; that the period of time elapsing between the filing of said claim with the United States Veterans Bureau and the denial thereof was more than five months; that a disagreement exists between the plaintiff and defendant and that said disagreement has existed since the 5th day of December, 1931.

Second Cause of Action

As a second cause of action plaintiff complains and alleges:

I.

As paragraph I plaintiff hereby incorporates the allegations contained in Paragraphs I, III, V, VI and VII of his first cause of action as fully and completely as if set out herein in full.

II.

That while in the said United States Army, and during the period between his said enlistment, and his honorable discharge as aforesaid, this complainant, desiring to be insured against the risks of war, and on or about February................., 1918, applied for a policy of war risk insurance in the sum of Five Thousand ($5,000.00) Dollars, and at the time of said application authorized the deduction from his service pay of all premiums that might become due thereon, and thereafter there was deducted from his monthly pay certain sums of money as premiums for said insurance to and including the month of February, 1920.

WHEREFORE, This plaintiff demands judgment against the defendant upon his first cause of action in the sum of $28.75 per month from the 31st day of October, 1918, until January 1, 1929, and upon his second cause of action in the sum of $28.75 per month from October 31, 1918, until January 1, 1929, together with interest thereon, and his costs and disbursements herein incurred, and attorneys' fees; and that this court determine what is a reasonable fee to be allowed plaintiff's

attorneys, and direct the payment of said fee to plaintiff's attorneys.

HAWLEY & WORTHWINE,
Aesidence; Boise, Idaho,
Attorneys for Plaintiff.

(Duly verified)

(Title of Court and Cause.)

DEMURRER:

Filed February 4, 1932

COMES NOW the defendant in the above entitled cause and demurs to plaintiff's Complaint on file herein, generally and specially, upon the following grounds, to-wit:

I.

That the first cause of action of plaintiff's Complaint does not set forth facts sufficient to constitute a cause of action against this defendant, in this: That it appears on the face of the complaint as pleaded in said first cause of action, that the plaintiff is not now, and that he never has been, permanently and totally disabled, but that the diseases as set forth in Paragraph VI of said first cause of action were only temporarily disabling.

II.

That the second cause of action of plaintiff's complaint does not set forth facts sufficient to constitute a cause of action against this defendant, in this: That it appears on the face of the complaint as pleaded in said second cause of action, that the plaintiff is not now, and that he never has been, permanently and totally disabled, but that the diseases as set forth in Paragraph VI of said second cause of action were only temporarily disabling.

H. E. RAY,
United States Attorney for the District of Idaho.

RALPH R. BRESHEARS,
Assistant U. S. Attorney for the District of Idaho.

Attorneys for the defendant.

(Title of Court and Cause.)

DECLINATION TO PLEAD FURTHER.

Filed June 7, 1932

COMES NOW the plaintiff in the above-entitled cause and having been advised of the ruling of the above-entitled Court upon the Demurrer to his com-

plaint herein, hereby declines to plead further in the above-entitled cause.

Dated this 7th day of June,

HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Plaintiff.

(Service acknowledged)

(Title of Court and Cause.)

JUDGMENT OF DISMISSAL.

Filed June 7, 1932

The above-entitled cause came on for hearing by the above-entitled Court upon the complaint and the demurrer of the defendant to the complaint, and written briefs were submitted by the respective parties, and the Court having considered the same, did, upon the 26th day of May, 1932, render an opinion sustaining the demurrer of the defendant to the complaint on file herein, and the plaintiff herein having filed his declination to plead further in the above-entitled cause.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiff and the action herein be and the same is hereby dismissed

at plaintiff's costs, and the plaintiff having excepted to the ruling of the Court upon said demurrer and having excepted to the dismissal of said cause, said exceptions are hereby allowed.

Dated this 7th day of June, 1932.

CHARLES C. CAVANAH,
District Judge.

(Title of Court and Cause.)

BILL OF EXCEPTIONS.

Filed June 7, 1932

BE IT REMEMBERED that in this case the plaintiff herein filed his complaint in the above entitled Court on the 10th day of December, 1931, the said complaint consisting of two causes of action, same being upon separate policies of war risk insurance issued to the plaintiff.

That thereafter on the 4th day of February, 1932, the defendant herein filed its general demurrer to said complaint and each cause of action thereof.

And that thereafter the respective parties hereto submitted written briefs and that the Court duly considered said written briefs and did upon the 26th day of May,

1932, render the following opinion and decision upon said demurrer:

"The demurrer to the complaint is sustained." to which said ruling the plaintiff duly took an exception, which exception was duly allowed by the Court.

Whereupon, and upon the 7th day of June, 1932, the the plaintiff herein filed in the above entitled Court his refusal to plead further.

Whereupon, and upon the 7th day of June, 1932, the Court made and entered in the above entitled cause an order dismissing said complaint, to which order of dismissal and ruling of the Court the plaintiff duly took an exception, which exception was duly allowed.

CERTIFICATE

It is hereby certified that the above and foregoing proceedings were had in this cause and that this Bill of Exceptions contains all of the papers relative to or necessary to the foregoing exceptions, and that it conforms to the truth and that it is in proper form.

It is further certified that this Bill is a true bill of exexceptions and that the foregoing exceptions in each case asked for were taken by the plaintiff, were allowed by the Court and that this Bill of Exceptions was duly prepared and filed within the time fixed by the Court and order of this Court, and is by me duly allowed and signed as a Bill of Exceptions, and I further certify that the only papers or documents considered by me in rendering an opinion sustaining the demurrer of the

defendant and in entering the order of dismissal herein, were the following:

1. Complaint of the plaintiff.
2. Demurrer of the defendant.
3. Declination of the plaintiff to plead further.

That the above and foregoing Bill of Exceptions is by me duly allowed and signed this 7th day of June, 1932, as a Bill of Exceptions.

CHARLES C. CAVANAH,
District Judge.

(Service acknowledged)

(Title of Court and Cause.)

STIPULATION FOR SETTLEMENT.

IT IS HEREBY STIPULATED AND AGREED that the above and foregoing Bill of Exceptions, which has been examined by the attorneys of record for the parties to the above entitled action, may be settled and allowed as plaintiff's Bill of Exceptions in the above entitled cause and that the Court may sign the above and foregoing certificate.

Dated this 7th day of June, 1932.

HAWLEY & WORTHWINE,
Residence, Boise, Idaho,
Attorneys for Plaintiff.

H. E. RAY,
United States Attorney for
District of Idaho.

RALPH R. BRESHEARS,
Assistant U. S. Attorney.
Attorneys for Defendant.

(Title of Court and Cause.)

PETITION FOR APPEAL

Filed June 14, 1932

The above named plaintiff, Henry K. Personius, conceiving himself to be aggrieved by the orders and rulings made upon the demurrer in the above entitled cause and by the order and judgment of this Court dismissing the same, filed and entered on the 7th day of June, 1932, in the above entitled cause and proceeding, does hereby appeal from the said ruling on demurrer and the said judgment of dismissal to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, for the reason and upon the ground specified in the assignments of error filed herewith, and prays that his appeal may be allowed; that a citation issue as provided by law, and that a transcript of the records, proceedings and papers upon which said judgment was entered as aforesaid, duly authenticated, may

be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, and this plaintiff prays for an order fixing the bond which the plaintiff shall give to secure to defendant the payment of costs if said plaintiff should fail to sustain his contention in said appeal.

Dated this 14 day of June, 1932.

HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Plaintiff.

(Service acknowleged)

(Title of Court and Cause.)

ASSIGNMENTS OF ERROR

Filed June 14, 1932

The above named plaintiff files this as his assignments of error and contends that the trial court erred in the following particulars in the above entitled cause:

I.

That the trial court erred in ruling and holding that the complaint in the above entitled cause did not state a cause of action.

II.

That the trial court erred in sustaining the demurrer to the complaint.

III.

That the trial court erred in entering a judgment of dismissal of the complaint and action herein.

IV.

That the trial court erred in dismissing the complaint herein.

Dated this 14 day of June, 1932.

HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Plaintiff.

(Service acknowleged)

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

Filed June 14, 1932.

Upon the motion of the plaintiff appearing by his attorneys, Messrs. Hawley & Worthwine, IT IS ORDERED that the appeal of the plaintiff above named be allowed as prayed for by the plaintiff in said cause, and it is further ordered that the amount of the bond be

fixed in the sum of $500.00 as security for defendant's costs on appeal and it is so ordered.

It is further ordered that a transcript of the record be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated this 14th day of June, 1932.

CHARLES C. CAVANAH,
Judge.

(Service acknowledged)

(Title of Court and Cause.)

CITATION ON APPEAL

Filed June 14, 1932

THE PRESIDENT OF THE UNITED STATES

TO THE UNITED STATES OF AMERICA, AND H. E. RAY AND RALPH R. BRESHEARS, ITS ATTORNEYS, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to appeal filed in the Clerk's office of the District Court of the United States, for the

District of Idaho, Southern Division, wherein Henry K. Personius is plaintiff and you are defendant, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

WITNESS The Hon. Charles Evans Hughes, Chief Justice of the Supreme Court of the United States of America, this 14th day of June, 1932.

CHARLES C. CAVANAH,
United States District Judge for District of Idaho, South- Division.

Attest:
W. D. McReynolds,
(Seal) *Clerk.*

Service of the within Citation is hereby accepted this 14th day of June, 1932.

H. E. RAY,
District Attorney.
RALPH R. BRESHEARS,
Assistant District Attorney.

(Title of Court and Cause.)

UNDERTAKING ON APPEAL

Filed June 14, 1932

KNOW ALL MEN BY THESE PRESENTS, That we, Henry K. Personius as principal, and THE

FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, as surety, are firmly held and bound unto the United States of America in the sum of Five Hundred ($500.00) Dollars, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, our heirs, executors and assigns.

Whereas, the plaintiff in the above entitled cause has appealed to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, from the judgment rendered in the District Court of the United States for the District of Idaho, Southern Division, which judgment was made and entered on the 7th day of June, 1932, wherein and whereby Henry K. Personius was plaintiff and the United States of America was defendant.

Now, therefore, the condition of the above obligation is such that if the said Henry K. Personius shall prosecute said appeal to effect and answer all costs if he fails to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

Dated this 14 day of June, 1932.

HENRY K. PERSONIUS,
Principal.

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,
By CHAS. W. MACK,

(Seal) *Attorney-in-Fact.*

Surety.

Countersigned by

CHAS. W. MACK,

Resident Agent, Boise, Idaho.

The foregoing bond is hereby approved this 14th day of June, 1932.

CHARLES C. CAVANAH,

Judge.

(Service acknowledged)

(Title of Court and Cause.)

PRAECIPE FOR APPEAL

Filed June 14, 1932

TO THE CLERK OF THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF IDAHO:

Sir:

You will kindly prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a properly authenticated record of appeal in the above entitled cause, including therein the following documents:

(a) Complaint.

(b) Demurrer.

(c) Minutes of the court.

(d) Declination to plead further.

(e) Judgment of dismissal.
(f) Bill of exceptions.
(g) Petition for appeal.
(h) Assignments of error.
(i) Order allowing appeal.
(j) Citation.
(k) Undertaking on appeal.
(l) Praecipe for appeal.
(m) Any other file, paper or assignment required to be incorporated in the transcript herein under the practice of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 14 day of June, 1932.

HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Plaintiff.

Service of the foregoing Praecipe for Appeal is hereby acknowledged this 14 day of June, 1932.

H. E. RAY,
United States Attorney.
RALPH R. BRESHEARS,
Assistant U. S. Attorney.

(Title of Court and Cause.)

STIPULATION

Filed June 14, 1932

IT IS HEREBY STIPULATED By and between H. E. RAY, United States Attorney for the District of Idaho, and RALPH R. BRESHEARS, Assistant United States Attorney for the District of Idaho, attorneys of record for the appellee, and HAWLEY & WORTHWINE, attorneys of record for the appellant, that in printing the abstract of record in the above entitled cause that all titles of papers, acceptances of service and verifications may be omitted save and except that the complaint shall bear the title of said cause.

Dated this 14 day of June, 1932.

HAWLEY & WORTHWINE,
Residence: Boise, Idaho,
Attorneys for Plaintiff.
H. E. RAY,
United States Attorney,
RALPH H. BRESHEARS,
Assistant U. S. Attorney,
Attorneys for Defendant.

(Title of Court and Cause.)

CLERK'S CERTIFICATE

I, W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages num-

bered from 1 to 31 inclusive, to be full true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit as requested by the Precipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $38.70 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 8th day of July, 1932.

W. D. McREYNOLDS,

Clerk.

(Seal)

No. 6891

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY K. PERSONIUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court, for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, District Judge

HAWLEY & WORTHWINE.
JESS HAWLEY
OSCAR W. WORTHWINE,
Attorneys for Appellant,
Residence: Boise, Idaho.
H. E. RAY,
United States Attorney,
WM H. LANGROISE,
Assistant U. S. Attorney,
SAM S. GRIFFIN,
Assistant U. S. Attorney,
RALPH R. BRESHEARS,
Assistant U. S. Attorney,
Attorneys for Appellee,
Residence: Boise, Idaho.

Filed ...., 1932.

...., Clerk.

FILED

AUG 6 - 1932

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY K. PERSONIUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court, for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, District Judge

HAWLEY & WORTHWINE,
JESS HAWLEY
OSCAR W. WORTHWINE,
Attorneys for Appellant,
Residence: Boise, Idaho.
H. E. RAY,
United States Attorney,
WM H. LANGROISE,
Assistant U. S. Attorney,
SAM S. GRIFFIN,
Assistant U. S. Attorney,
RALPH R. BRESHEARS,
Assistant U. S. Attorney,
Attorneys for Appellee,
Residence: Boise, Idaho.

Filed ...., 1932.

...., Clerk.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY K. PERSONIUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court, for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, District Judge

STATEMENT OF THE CASE

The single point involved in this case is whether or not the Court committed error in sustaining a demurrer. in its nature special, to the complaint on file herein. This in turn involves the sole question as to whether a veteran can recover under a war risk insurance policy where he was permanently disabled and also totally disabled for a continuous period of more than ten years, and then recovers from his total disability, but not from his permanent disability.

The complaint (Ts. 11-16) sets out the following facts:

(a) That the plaintiff was a resident of Idaho.

(b) That the action was brought under the terms of the War Risk Insurance Act.

(c) That the plaintiff served in the United States Army from the 16th day of June, 1916, until the 27th day of September, 1920.

(d) That he applied for two policies of war risk insurance in the amount of $5,000.00 each, and that the application was made in November, 1917.

(e) That the certificates evidencing said insurance were issued, but have been lost.

The necessary jurisdictional fact concerning a disagreement is alleged (Ts. 14). The only allegation out of the ordinary is that contained in Paragraph VI of the complaint, and in Paragraph VI it is set out that on October 31, 1918, the plaintiff suffered a severe injury while engaged in armed combat with the armed forces of the Central Powers, and that he became afflicted with osteomyelitis and other disabilities, and it is then set forth:

> "And the plaintiff has continuously suffered from and been afflicted with said injuries and diseases from October 31, 1918, and this plaintiff is informed and believes, and upon information and belief alleges the fact to be that as a result of said injuries and diseases the said plaintiff became and was, on Octo-

ber 31, 1918, and during the time said insurance was in full force and effect, totally disabled, and that such total disability was founded upon conditions which made it reasonably certain that it would continue throughout his life and that he was totally and permanently disabled from October 31, 1918, until January 1, 1929." (Ts. 13-14).

To this complaint and to each cause of action thereof, the defendant interposed a demurrer as follows:

> "That the first cause of action of plaintiff's complaint does not set forth facts sufficient to constitute a cause of action against this defendant, in this: That it appears on the face of the complaint as pleaded in said first cause of action, that the plaintiff is not now, and that he never has been, permanently and totally disabled, but that the diseases as set forth in Paragraph VI of said first cause of action were only temporarily disabling." (Ts. 16).

Paragraph II of the demurrer directed to the second cause of action is in the exact words above quoted. This demurrer was submitted to the Court and by the Court upon the 26th day of May, 1932, was sustained (Ts. 20). The plaintiff declined to plead further (Ts. 17), and on June 7, 1932, the Court entered a judgment of dismissal of the complaint (Ts. 18-19). Exceptions were duly preserved (Ts. 18-19-20) and the appeal duly taken.

SPECIFICATIONS OF ERROR.

We believe that we can clearly and understandingly state our position by making specifications of the points upon which we rely and under each specification refer to the assignments of errors pertaining thereto and by which the point is raised.

SPECIFICATION NO. 1.

THAT THE COURT ERRED IN RULING THAT THE COMPLAINT DID NOT STATE A CAUSE OF ACTION AND IN SUSTAINING DEFENDANT'S DEMURRER AND IN DISMISSING THE COMPLAINT.

First Assignment.

That the trial court erred in ruling and holding that the complaint in the above entitled cause did not state a cause of action (Ts. 23).

Second Assignment.

That the trial court erred in sustaining the demurrer to the complaint (Ts. 24).

Third Assignment.

That the trial court erred in entering a judgment of dismissal (Ts. 24).

Fourth Assignment.

That the trial court erred in dismissing the complaint herein.

POINTS AND AUTHORITIES.

SPECIFICATION NO. 1.

THAT THE COURT ERRED IN RULING THAT THE COMPLAINT DID NOT STATE A CAUSE OF ACTION AND IN SUSTAINING DEFENDANT'S DEMURRER AND IN DISMISSING THE COMPLAINT.

PROPOSITION OF LAW NO. 1.

THIS BEING AN APPEAL FROM AN ORDER SUSTAINING A DEMURRER TO A COMPLAINT. THE COMPLAINT MUST BE CONSTRUED MOST FAVORABLY TO THE PLAINTIFF.

Paragraph 724, Title, 28, U. S. C. A., R. S. 914.

Section 6701, Idaho Compiled Statutes of 1919 (Section 5-801 Idaho Code Annotated, 1932 edition).

Sommer v. Carbon Hill Coal Co., 89 Fed. 54 (9 C. C. A.)

U. S. v. Parker, 120 U. S. 89, at 94, 7 Sup. Ct. 454.

PROPOSITION OF LAW NO. 2.

VETERANS' POLICIES AND THE STATUTES AND REGULATIONS APPLICABLE THERETO SHOULD BE GIVEN A LIBERAL CONSTRUCTION IN FAVOR OF THE SOLDIER.

U. S. v. Sligh, 31 Fed. (2d) 735.

U. S. v. Worley (C. C. A. 8th) 42 Fed. (2d) 197.

U. S. v. Phillips (C. C. A. 8th) 44 Fed. (2d) 689.

Quirk v. U. S., 45 Fed. (2d) 631.

U. S. v. Cox, 24 Fed. (2d) 944.

Starnes v. U. S., 13 Fed. (2d) 212.

PROPOSITION OF LAW NO. 3.

THE WORD "PERMANENT" AS CONSTRUED BY THE COURTS DOES NOT MEAN UNENDING OR ABSOLUTE OR FOREVER.

Texas & Pacific Railroad v. City of Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385.

Mead v. Ballard, 7 Wall. 290, 74 U. S. 290, 19 L. ED. 190.

Soule v. Soule, 4 Cal. App. 97, 87 Pac. 205.

PROPOSITION OF LAW NO. 4.

THE PROVISIONS IN THE ACTS OF CONGRESS AND IN THE REGULATIONS PROVIDING FOR THE RESUMPTION OF THE PAYMENT OF PREMIUMS IN THE EVENT OF RECOVERY FROM PERMANENT AND TOTAL DISABILITY CLEARLY MEAN THAT THE WORD 'PERMANENT" AS USED IN THE INSURANCE DOES NOT MEAN ALWAYS.

Congressional Record of the 65th Congress, Volume 55, page 6901.

40 Stat. at Large 409.

Century Dictionary and Cyclopedia, Volume 3, page 1802.

Webster's New International Dictionary, page 685.

Paragraph 512, page 248 of Title 38, U. S. C A.

Regulations and Procedure of the United States Veterans Bureau, Volume 2, pages 1241 to 1273, Bulletin No. 3.

Regulations and Procedure, United States Veterans Bureau, Part 1, page 9.

Regulation No. 57, Part I, Regulations and Procedure, United States Veterans Bureau, page 54.

Penn Mutual Life Insurance Company v. Milton, 127 S. E. 140.

Wenstrom v. Aetna Life Insurance Company, 215 N. W. 93.

ARGUMENT.

THAT THE COURT ERRED IN RULING THAT THE COMPLAINT DID NOT STATE A CAUSE OF ACTION AND IN SUSTAINING DEFENDANT'S DEMURRER AND IN DISMISSING THE COMPLAINT.

In as much as all of our assignments of error relate to the ruling of the trial court in holding that the demurrer should be sustained and in the dismissal of the action as a result of that ruling, we believe that it would serve no

useful purpose to discuss the various assignments of errors separately, and that the points raised may be considered under the above and foregoing specification of error.

It will be observed that in Paragraph VI of the complaint (Ts. 13) that the plaintiff alleges that during the time the policy was in force, and on October 31, 1918, he was severely injured and also alleges that on October 31, 1918, he became totally disabled and that such total disability was founded upon conditions which made it reasonably certain that it would continue throughout his life, and that he was totally and permanently disabled from October 31, 1918, until January 1, 1929 (Ts. 13-14). The demurrer filed attempts to specify wherein the complaint is defective, and after alleging that the complaint does not set forth facts sufficient to constitute a cause of action, it states as follows:

> "In this: That it appears on the face of the complaint as pleaded in said first cause of action, that the plaintiff is not now, and that he never has been, permanently and totally disabled, but that the diseases as set forth in Paragraph VI of said first cause of action were only temporarily disabling." (Ts. 16).

This demurrer, of course, does not clearly set forth the facts as contained in the complaint, because it does not appear from the complaint that the injuries suffered by the plaintiff were "only temporarily disabling," but on the other hand it does appear from the complaint that the

plaintiff was permanently injured, because the complaint alleges injuries which are in their very nature permanent and in addition states:

> "And the plaintiff has continuously suffered from and been afflicted with said injuries and diseases from October 31, 1918." (Ts. 13).

And in addition the complaint sets forth very clearly that on October 31, 1918, the plaintiff became totally disabled and then charges permanent disability in the words of the policy as found in Regulation No. 11, which regulation has been the basis for the determination of total and permanent disability in every single case that has been decided involving war risk insurance, and is a part of the contract, and the complaint alleges that the plaintiff's total disability which he suffered on October 31, 1918, "was founded upon conditions which made it reasonably certain that it would continue throughout his life and that he was totally and permanently disabled from October 31, 1918, until January 1, 1929."

Undoubtedly the view of the defendant ,which view the trial court adopted, is that under the contract of insurance it was impossible for the plaintiff ever to have been totally and permanently disabled if he is not now totally and permanently disabled. We believe that this view violates the terms of the statutes providing for war risk insurance, and the regulations governing the same, which statutes and regulations are in fact parts of the policy.

PROPOSITION OF LAW No. 1.

THIS BEING AN APPEAL FROM AN ORDER SUSTAINING A DEMURRER TO A COMPLAINT, THE COMPLAINT MUST BE CONSTRUED MOST FAVORABLY TO THE PLAINTIFF.

Under the Conformity Act, paragraph 724, Title 28, U. S. C. A., R. S. 914, the practice, pleadings and forms and modes of proceedings in this case must conform as near as may be to the practice, pleadings and forms and modes of proceeding in the State of Idaho, the district in which this case arose.

Section 6701 of the Idaho Compiled Statutes of 1919, (Section 5-801 Idaho Code Annotated, 1932 edition,) is as follows:

> "PLEADINGS LIBERALLY CONSTRUED.
>
> In the construction of the pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice between the parties."

This court in passing upon a case arising in the State of Washington, which has similar code provisions to the State of Idaho, in speaking of a provision of the Washington Code, which is in exactly the same words as the above quoted section of the Idaho Code, said:

> "This rule of construction, contrary to that established by the common law, requires that every reasonable intendment and presumption is to be made

in favor of the pleading; and it will not be set aside on demurrer unless it be so fatally defective that, taking all the facts to be admitted, the court can say they furnish no cause of action whatever."

Sommer v. Carbon Hill Coal Co., 89 Fed. 54 (9 C. C. A.)

See also U. S. v. Parker, 120 U. S. 89, at 94, 7 Sup. Ct. 454.

PROPOSITION OF LAW NO. 2.

VETERANS' POLICIES AND THE STATUTES AND REGULATIONS APPLICABLE THERETO SHOULD BE GIVEN A LIBERAL CONSTRUCTION IN FAVOR OF THE SOLDIER.

This court in the Sligh case held:

"These policies and the statutes applicable to the same are entitled to a liberal construction in favor of the soldier."

United States v. Sligh, 31 Fed. (2d) 735.

See also:

United States v. Worley (C. C. A. 8th) 42 Fed. (2d) 197.

United States v. Phillips (C. C. A. 8th) 44 Fed. (2d) 689.

Quirk v. United States, 45 Fed. (2d) 631.

United States v. Cox, 24 Fed. (2d) 944.

Starnes v. United States, 13 Fed. (2d) 212.

PROPOSITION OF LAW No. 3.

THE WORD "PERMANENT" AS CONSTRUED BY THE COURTS DOES NOT MEAN UNENDING OR ABSOLUTE OR FOREVER.

In approaching a solution of the problem as to what is meant in the various statutes by the words "permanent disability" or "total and permanent," it will be remembered that the word "permanent" as used in contracts is not construed in its literal sense, but is construed in its ordinary sense. For example, we speak of a person as having a permanent position. This does not mean that such person has a position that he will occupy the rest of his life. We likewise speak of persons as being permanently located at a certain place, city or town. This does not mean that they are anchored there forever and must stay there until they die.

The United States Supreme Court has repeatedly held that the word "permanent" does not mean forever. Where a city made a large donation of bonds upon the condition that the railroad company would permanently establish certain improvements at a certain place, and it appeared that a terminus had been established and been maintained for eight years, the United States Supreme Court said:

> "This was the establishment at that point of the things contracted for in the agreement. It was the fair meaning of the words 'permanent establishment,' as there was no intention at the time of remov-

ing or abandoning them. The word 'permanent' does not mean 'forever,' or lasting forever, or existing forever. The language used is to be considered according to the nature and its relation to the subject matter of the contract, and we think that these things were permanently established by the Railway Company."

See Texas & Pacific Railroad vs. City of Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385.

See also Mead v. Ballard, 7 Wall. 290, 74. U. S. 290, 19 L. Ed. 190.

In Soule v. Soule, 4 Cal. App. 97, 87 Pac. 205, it is held that the word "permanent" is not the equivalent of perpetual, or unending or lifelong or unchangeable.

Certainly the pleadings in this case show that the plaintiff was suffering from a chronic condition which renders a man totally disabled and which, as is shown by the complaint, has continued over a long period of years, is a permanent condition that is based upon conditions that render it reasonably certain that it will last throughout the life of the person afflicted with it.

PROPOSITION OF LAW NO. 4.

THE PROVISIONS IN THE ACTS OF CONGRESS AND. IN THE REGULATIONS PROVIDING FOR THE RESUMPTION OF THE PAYMENT OF PREMIUMS IN THE EVENT OF RECOVERY FROM PERMANENT AND TOTAL

DISABILITY CLEARLY MEAN THAT THE WORD "PERMANENT" AS USED IN THE INSURANCE DOES NOT MEAN ALWAYS.

The trial court ruled that because the complaint alleged that the plaintiff was totally and permanently disabled from October 31, 1918, until January 1, 1929, that the complaint did not state a cause of action, notwithstanding the fact that the complaint did charge that the total disability which the plaintiff suffered in 1918 was founded upon conditions which made it reasonably certain that it would continue throughout the plaintiff's life, and notwithstanding the fact that the complaint alleged that the plaintiff was totally and permanently disabled from October 31, 1918, until January 1, 1929, thus taking the view that the word "permanent" as used in war risk insurance must be construed in its literal sense as meaning absolute, unchanging and forever.

A search through the various sources such as statements by executive heads, committee chairmen, and members of Congress and the Acts of Congress and the regulations clearly shows that it was intended that a veteran could be permanently and totally disabled and then recover from such total and permanent disability.

Long prior to the enactment of the amendments to the original War Risk Insurance Act, which amendments were enacted on October 6, 1917, the question of insurance was prominently in the minds of the executive officers of the United States, and in this connection we quote

from the letter of the Honorable W. G. McAdoo, then Secretary of the Treasury, to the then President of the United States, written July 31, 1917, and which was incorporated in the Congressional Record of the 65th Congress, Volume 55, page 6901, as follows:

> "We are not relying upon the volunteer system in this war. We are drafting men and compelling them to make, if necessary, the supreme sacrifice for their country. A higher obligation rests upon the government to mitigate the horrors of war for the fighting men and their dependents, insofar as it is possible to do so, through compensations, indemnities, and insurance. Less than this a just, generous, and humane government cannot do. We must set an example to the world, not alone in the ideals for which we fight, but in the treatment we accord to those who fight and sacrifice for us."

This was an expression by the Secretary of the Treasury, who was to have and did have the administration of the War Risk Insurance Act, until the Veterans Bureau was created by an Act of Congress on August 9, 1921.

Mr. McAdoo was not merely expressing the sentiments of an executive offcer of the Government, but the ideals and sentiments of the American people.

The Act of War Risk Insurance of October 6, 1917 (40 Stat. 409) provided that war risk insurance was to be granted to members of our armed forces against the death or total and permanent disability of the insured, and provided among other things:

> "The United States upon application to the Bureau and without medical examination shall grant insurance against the death or total permanent disability of any person. * * * *"

and also in providing for the benefits under said policy stated:

> "It shall be payable only to spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them."
> (40 Stat. 409).

It will be observed that in the original Act Congress first used the phrase that the soldiers were to be insured against the death or "total permanent disability" and then in the same Act provided that the insurance benefits should be paid to a certain limited number of persons "and also during total and permanent disability to the injured person," Surely had Congress intended that before a soldier could receive the benefits of his insurance under the total and permanent disability provision contained in the statute, it would have used words connoting eternal forever, or everlasting and would not have used the word "during" in the above quoted part of the statute.

The definition of the word "during" contained in the Century Dictionary is as follows:

> "In the time of; in the course of; throughout the continuance of:

Century Dictionary and Cyclopedia, Volume 3, page 1802.

Webster's Dictionary defines the word "during" as:

"In the time of; as long as the action or existence of."

Can it be conceivable that Congress meant that in order for the benefits of the insurance policy to be paid to the veteran that he must not only be totally disabled, but that he must be in such condition that there could be no possible recovery from his condition of total disability when it used the words "during total and permanent disability." Had Congress intended that the contract of insurance should be payable only in case of a total disability based upon conditions from which it was impossible to recover and from which there could be no recovery, it would have used words clearly indicating that idea rather than using the words which imply a time limit and rather than using the word "during" which implies a beginning and an ending and is one of the units of measurement.

Again the Congress of the United States recognized that total and permanent disability was not an absolute unchanging condition, for it provided:

"In case where an insured, whose yearly renewable term insurance has matured by reason of total and permanent disability, *is found and declared to be no longer permanently and totally disabled*, and where the insured is required under regulations to renew payment of premiums on said term insurance,

> and where this contingency is extended beyond the period during which said yearly renewable term insurance otherwise must be converted, there shall be given such insured an additional period of two years from the date on which he is required to renew payment of premiums in which to convert said term insurance, as hereinbefore provided." (Italics ours).
>
> Paragraph 512, page 248 of Title 38, U. S. C. A.

Why did Congress provide for the resumption of the payment of premiums as contained in the above section if the word "permanent" as used in the definition of total and permanent disability was absolute? Why did Congress use the words "In case where an insured, whose yearly renewable term insurance has matured by reason of total and permanent disability, is found and declared to be no longer permanently and totally disabled" if it were impossible for him to have become totally and permanently disabled and recover from it? Logic and reasoning lead conclusively to the proposition that under war risk insurance, it is possible for the insured to be totally and permanently disabled to such an extent as to entitle him to payments and then to recover from the total disability to such an extent that he is no longer totally and permanently disabled. If this were not the case, Congress would never have enacted the above provisions of the statute.

This Act, enacted October 6, 1917, was drafted by a committee selected for that purpose and the Honorable Julian W. Mack, for many years a distinguished member

of the Circuit Court of Appeals for the Seventh Circuit, who was known as a national figure not only because of his service while on the circuit bench of the Seventh Circuit Court, but because of his ability as an instructor in the law, served as Chairman of the Committee that drafted the War Risk Insurance Act. As early as October 16, 1917, a conference was called at Washington, D. C., at which conference the Honorable Julian W. Mack presided, it being a conference between Mr. Mack, the man who drafted the War Risk Insurance Act, and such members of the United States Army as could attend. The result of this conference was published as Bulletin No. 3 of the War Risk Insurance Act under date of October 16, 1917, and is to be found in Volume 2 of the Regulations and Procedure of the United States Veterans Bureau at page 1241 to page 1273, and this Bulletin is entitled

> "Explanation submitted by the Honorable Julian W. Mack of the provisions of the military and naval insurance act presented at a conference of officers and enlisted men of the army and navy held in Washington on October 16, 17, and 18, 1917. This explanation has the full approval of the Bureau of War Risk Insurance.
>
> William C. DeLanoy,
> Director.
>
> Approved:
> W. G. McAdoo,
> Secretary of the Treasury."

In that conference, the Honorable Julian W. Mack stated in regard to war risk insurance:

> "Then, another provision that the Government generously added: While it based the premiums upon these extremely low term rates, it added this provision that not only on a man's death should the policy mature, but also on his becoming totally and permanently disabled. This has nothing at all to do with the compensation provision. You pay nothing for that. The compensation is given only if the injuries are received in the line of duty. Your insurance against total disability or death is against total disability or death, no matter how it arises or when it arises, whether in the service or out of the service, because of the service or not because of the service. It is like insurance in any private company and covers all contingencies. But, as I say, added to the life insurance, the Government throws in for good measure the provision that if before death you become totally and permanently disabled, the policy will then become due."
>
> Bulletin No. 3, Bureau of War Risk Insurance, Volume 2, Regulations and Procedure, U. S. Veterans Bureau at page 1258.

At this same conference, a member of the conference asked Judge Mack the following question:

> "Your statement, Judge, of total permanent disability—suppose a man is pronounced totally and

permanently disabled by a board of physicians, and thereafter it develops that he has recovered somewhat. Would he still be considered under that condition, or would that word "permanent" come in, and if so, what is the effect?

Judge Mack: That is a problem.

A Member: That's got to be settled.

Judge Mack: And I think the Bureau will settle the problem liberally."

Bulletin No. 3, Bureau of War Iisk Insurance, Volume 2, Regulations and Procedure, U. S. Veterans Bureau, at page 1265.

The Bureau did settle the problem liberally by issuing Regulation No. 11, which was promulgated March 9th, 1919, and which is as follows:

(TREASURY DECISION 20, W. R.)

TOTAL DISABILITY

Regulation No. 11 relating to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent.

TREASURY DEPARTMENT
Bureau of War Risk Insurance

Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following regu-

lation is issued relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent:

"Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV to be total disability.

"Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

"Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantial gainful occupation, the payment of installments of insurance shall be discontinued forthwith, and no further installments thereof shall be paid so long as such recovered ability shall continue."

William C. DeLanoy,
Director.

Approved:
W. G. McAdoo,
Secretary of the Treasury.

Regulations and Procedure United States Veterans Bureau, Part 1, Page 9.

We urge that the word "permanent" as used in the Statute and as defined in Regulation No. 11 is not to be construed in its literal sense, but is to be construed in its ordinary sense.

We urge that it is implied by the definition of total and permanent disability as contained in Regulation No. 11 that it is possible for a disabled person to be totally and permanently disabled and yet recover from the condition of being totally and permanently disabled. If this were not true, the regulation would not have provided for the cessation of the payment of installments upon the recovery of the ability of the disabled veteran to follow continuously any substantially gainful occupation.

It was the intention of Congress and also of the Director of the Bureau of War Risk Insurance, when Regulation No. 11 was issued, that the insurance contracted for would be payable at or upon discharge in the event that the insured was prevented from following continuously any substantially gainful occupation, and his physical disability was based upon conditions which rendered it reasonably certain that such disability would continue throughout the life of the insured. This is borne out by the fact that Regulation No. 11 provides among other things:

> "Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered, etc."

The regulation itself provides that no insurance shall be paid except on the ground 'that the insured has become totally and permanently disabled" and yet provides that when it shall be established that he "has recovered the ability to continuously follow any substantially gainful occupation" the payment of installments of insurance shall cease.

So that in any case of total and permanent disability, within this regulation, it may always be possible for the insured to recover the ability to follow continuously any substantially gainful occupation, and since this is true, if at any time while the insurance is in effect the insured becomes totally disabled and the conditions at that time make it reasonably certain that his disability will continue throughout his life, the insurance becomes payable regardless of the fact that in the future he may recover, or as in this case, after a period of eleven years, did actually recover the ability to follow a substantially gainful occupation.

It will be borne in mind in this connection that the provision regarding the cessation of the payment of installments was not made for a case in which a mistake had been made in regard to the original award of the insurance and was not intended to cover a case where the insured had not actually been totally and permanently disabled, because the regulation in covering the situation said that whenever it shall be established that any person to whom any installment of insurance has been paid "on the ground that the insured has become totally and perma-

nently disabled," and the only way that any insurance could be paid under that regulation was that the insured became totally and permanently disabled. However, the regulation goes on to say that where the insured "has recovered the ability to follow continuously any substantially gainful occupation the payments of insurance shall be discontinued." In other words this regulation means that if the plaintiff in this action, while his insurance was in force and effect, became totally disabled and the conditions surrounding his disability were such that it was reasonably certain that it would continue throughout his life, that the insurance became due him at that time and that he was entitled to such payments so long as that condition continued.

For the Court upon this complaint as it now stands to say that no cause of action is stated would be to discriminate between the plaintiff in this action and all of those who have been awarded insurance and have had that insurance paid in installments and have since been found not to be totally and permanently disabled, or have recovered their ability to follow continuously a substantially gainful occupation.

As early as November 26, 1920, the Bureau of War Risk Insurance recognized that the inability to engage continuously in an occupation for a period of six months raised a presumption of permanent total disability and promulgated Regulation No. 57, wherein it was provided under Subdivision B thereof:

"The procedure in making permanent total disability ratings for purposes of insurance, or compensation, or both shall be as follows:

* * * * *

"Where the disabled person on the date of the issuance of this regulation or hereafter shall be either an inmate of a hospital or asylum during a continuous period of six months or more, or on the date of this regulation is or hereafter shall be rated as totally disabled or totally and temporarily disabled for a continuous period of six months or more and be unable to follow continuously any substantially gainful occupation during such six months, and in addition at the time of the medical examination hereinafter prescribed, shall be found to be in such physical or mental condition as to require further hospitalization or otherwise unable to follow continuously any substantially gainful occupation."

Regulation No. 57, Part I, Regulations and Procedure, U. S. Veterans Bureau, page 54.

Subdivision 8 of Regulation 57 provides as follows:

"All terminations of an existing total permanent disability award for compensation and insurance purposes and all reductions thereof shall be effective the last day, inclusive, of the month in which the revised award is made, regardless of the date of the revised rating. When an award of total permanent disability is terminated under a contract of insu-

rance, the insured should be forthwith notified of the fact and advised that his premium must henceforth be paid if the remaining insurance is to continue in force, and advised of the amount and due date of the monthly premium, and shall be allowed the usual grace period of 31 days from the effective date of the discontinuance of such total and permanent disability payments under the contract of insurance."

It will be noted from the above regulation that the Bureau of War Risk Insurance on November 26, 1920, and at a time when the plaintiff in this case was totally disabled beyond any question passed a regulation providing that a veteran should be rated as totally and permanently disabled for purposes of insurance, where the disabled person shall "on the date of this regulation is or hereafter shall be rated as totally disabled or totally and temporarily disabled for a continuous period of six months or more and be unable to follow continuously any substantially gainful occupation during such six months, and in addition at the time of the medical examination hereinafter prescribed, shall be found to be in such physical or mental condition as to require further hospitalization or otherwise unable to follow continuously any substantially gainful occupation." A clear import of this regulation is that any one who had a continuous total disability for a period of six months and at the end of the six months was unable to follow continuously any substantially gainful occupation should be rated as permanently and totally disabled, and at the very time that this regulation was passed

the plaintiff was suffering from a total disability and had suffered continuously therefrom since October 31, 1918, or a period of more than two years before the promulgation of the above regulation, and continued to be totally and permanently disabled for a period of more than eight years after the regulation was issued, and it is still contended that he should not be considered as ever having been totally and permanently disabled for insurance purposes.

It will be noted again that Regulation No. 57 provides for a grace period of thirty-one days and for notification of the insured when his award of total and permanent disability is terminated under the contract of insurance. All of these provisions certainly imply that it is possible for one to be totally and permanently disabled and secure the benefits of the term insurance provided for soldiers and for him to cease to be totally and permanently disabled.

This court has affirmed many judgments allowing a recovery upon war risk insurance on the ground that the veteran was totally and permanently disabled. Suppose in one of those cases the insured becomes rehabilitated and like the plaintiff in the case at bar becomes able to follow a gainful occupation, does such a veteran have to refund what has been paid him? Does he lose his right to keep his insurance in force? Obviously not. And this plaintiff should not be discriminated against.

A leading case upon this entire subject is that of Penn Mutual Life Insurance Company v. Milton, 127 S. E. 140. In that case the policy provided for the discontinu-

ance of premiums "which thereafter may become due under this policy during the continuance of the said total disability of the insured," and also provided for certain monthly payments upon proof that the insured "has become wholly disabled by bodily injury or disease, so that he is and thereby will be permanently and continuously unable to engage in any occupation whatever for remuneration or profit, and that such disability has existed continuously for not less than sixty days prior to the furnishing of proof, thereupon the company will grant certain benefits." The precise question decided by the Supreme Court of Georgia was this:

> "Could a disability which has lasted for only 16 months, and from which the insured then recovered, be a permanent disability within the meaning of these clauses of the policy?"

It will be noted that in the Georgia case the man was totally disabled for only a period of 16 months and after the court stated the principle that an insurance policy must be liberally construed, said:

> "With these legal signposts for our guidance, what is the proper construction of the above provision of this policy? Does the language, 'permanently and continuously,' mean that the total disability must last forever before the insured will be entitled to the benefits provided in the policy? 'Permanent' is the antithesis of 'temporary.' The word 'permanent' does not always mean forever, or lasting for-

ever. The meaning of that word is to be construed according to its nature and in its relation to the subject-matter of the contract. Mead v. Ballard, 7 Wall. 290, 19 L. Ed. 190; Texas & P. R. Co. v. Marshall, 136 U. S. 393, 34 L. Ed. 385, 10 Sup. Ct. Rep. 846. The words 'permanently and continuously,' standing alone, would mean that the total disability must be a lasting one; but when these words are taken in connection with other language used in the several provisions of the policy set out above, the fair construction of these words is, not that the total disability shall last or exist forever, but that a disability which existed continuously for no less than 60 days prior to the furnishing of proof is, within the meaning of the policy, a 'permanent disability.' * * *

"This language clearly indicates that the insurer meant that the total disability, on proof of which it would grant the benefits named, was not one which might last during the entire life of the insured, but one which might end prior to his death. So we are of the opinion that under the terms of this policy a total disability which lasted for sixteen months was a 'permanent disability,' in the meaning of the above provisions of this policy."

Penn Mutual Life Insurance Company v. Milton, 127 S. E. 140.

We take it that the above cited case is directly in point and involving facts that are much more favorable to the insurance company than the facts in this case.

Another case which we believe to be directly in point is that of Wenstrom vs. Aetna Life Insurance Company, decided by the Supreme Court of North Dakota August 18, 1927, and reported in 215 N. W. at 93, and in this case it appeared that the insured did recover but had been totally disabled and the policy contained the provision that the company 'will pay to the life beneficiary the sum of $10 for each thousand dollars of the sum insured, and will pay the same sum on the same day of every month thereafter during the lifetime, and during such disability of the insured." The decision was based upon the words "and during such disability of the insured," and the Court in passing upon the matter held as follows:

> "That is the meaning of this phrase, 'during the lifetime, and during such disability of the insured'? If the disability must be incurable and continue during the life of the insured, it would be sufficient to say that the same sum would be paid on the same day of every month during the lifetime of the insured. Is not this provision in the policy the same as if the contract said, will pay the same sum on the same day of every month during the lifetime of the insured, or as long as he is disabled? We must assume that the phrase 'and during such disability of insured,' means something, and if it means anything it means that the amount will be paid during such

disability, whether it be for life, for years, or for months, and it would seem that it is placed there to cut off the indemnity in case the insured recovers. It is settled law that in construing insurance policies the language of the entire policy must be considered, and when capable of two constructions the most favorable to the insured must be given. Under this rule we are of the opinion that the words 'and during such disability of the insured,' qualifies the preceding language in that paragraph so as to permit a recovery when the disability is curable, but the indemnity ceases if the insured recovers. From this construction it follows that the insured is entitled to the indemnity during the entire period of his disability."

Wenstrom v. Aetna Life Insurance Company, 215 N. W. 93.

We submit, in view of the fact that the policy of insurance provides for a possibility of a recovery, and since the rule applicable to similar insurance policies issued by commercial companies is that even though the insured may have recovered at the time of the trial, he still is entitled to recover for the period that he was totally disabled, and in view of liberal construction that is to be placed upon this insurance and the statutes and regulations governing the same, that all that is involved in this case is a question of fact to be decided by the Court or

jury at the time of the trial, and that a cause of action has been stated, and that if the allegations of the complaint are established at the time of the trial that the plaintiff should be allowed to recover his monthly installments for the period of eleven years that he was totally and permanently disabled.

Respectfully submitted,

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No. 6[illegible]91

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY K. PERSONIUS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

HON. CHARLES C. CAVANAH, District Judge.

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Filed ...., 1932

FILED
AUG 20 1932

...., Clerk

PAUL P. O'BRIEN,
CLERK

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HENRY K. PERSONIUS,

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Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

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Filed.., 1932

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Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

STATEMENT OF FACTS.

On December 10, 1931, the plaintiff, appellant herein, filed his complaint against the United States (Tr. 11) seeking recovery upon two policies of war risk term insurance, in the amount of $5,000.00 each, which he alleges were issued to him by the defendant during his military service (Tr. 12, 15).

Plaintiff's first cause of action alleges residence within the jurisdiction of the United States District Court (Tr. 11), that the action is brought under the provisions of the War Risk Insurance Act of October 6, 1917, as amended (Tr. 12), the military service of plaintiff (Tr. 12), the issuance of a $5,000.00 policy of war risk insurance by the defendant in November, 1917, upon which premiums

were paid by the plaintiff to include the month of February, 1920 (Tr. 12), and as a basis for his right to judgment against the United States, Paragraph VI of plaintiff's First Cause of Action contains the following averments:

"VI.

That while this plaintiff was in the military service of the United States as aforesaid and during the World War, and subsequent to the effective date of said insurance, and while said policy was in full force and effect, this plaintiff on October 31, 1918, while engaged in armed combat with the Armed forces of the Central Powers, was wounded by being struck in the left leg by a fragment of high explosive shell, which caused a destruction of bone substance in the tibia and fibula, a contracture of the plantar tendon, a shortening of the left leg, an atrophy of the left leg, an infection of the left leg, and osteomyelitis of the bones of the left leg, and the plaintiff has continuously suffered from and been afflicted with said injuries and diseases from October 31, 1918, and this plaintiff is informed and believes, and upon information and belief alleges the fact to be that as a result of said injuries and diseases the said plaintiff became and was, on October 31, 1918, and during the time said insurance was in full force and effect, totally disabled, and that such total disability was founded upon conditions which made it reasonably

certain that it would continue throughout his life *and that he was totally and permanently disabled from October* 31, 1918, *until January* 1, 1929. *That by reason thereof he became entitled to receive from the defendant the sum of* $28.75 *per month from October* 31, 1918, *to January* 1, 1929."

(Tr. 13, 14)

The jurisdictional allegation of demand by plaintiff, and the subsequent disagreement, is contained in Paragraph VII of plaintiff's first cause of action (Tr. 14).

Plaintiff's second cause of action is identical with his first, with the exception of the fact that it is predicated upon a $5,000.00 policy, alleged to have been issued to the plaintiff by the defendant during the month of February, 1918, premiums having been paid thereon by the plaintiff, according to the allegations of Paragraph II, to include the month of February 1920 (Tr. 15), as in the case of the first policy.

On February 4, 1932, the defendant, appellee herein, filed a demurrer to plaintiff's complaint, paragraph I of which is as follows:

"I.

That the first cause of action of plaintiff's Complaint does not set forth facts sufficient to constitute a cause of action against this defendant, in this: That it appears on the face of the complaint as pleaded in said first cause of action, that the plaintiff is not

now, and that he never has been, permanently and totally disabled, but that the diseases as set forth in Paragraph VI of said first cause of action were only temporarily disabling."

(Tr. 16)

Paragraph II of the demurrer is directed to plaintiff's Second Cause of Action, and differs from Paragraph I in that respect only (Tr. 17).

Plaintiff's demurrer was sustained by the court on May 26, 1932 (Tr. 18) and on June 7, 1932, plaintiff filed his declination to plead further (Tr. 17, 18), whereupon the court on the same date entered an order dismissing plaintiff's complaint (Tr. 18, 19). This action of the court is assigned as error.

POINTS AND AUTHORITIES.

I.

A COMPLAINT WHICH ALLEGES RECOVERY OF AN ABILITY TO FOLLOW CONTINUOUSLY A SUBSTANTIALLY GAINFUL OCCUPATION IS FATALLY DEFECTIVE AND DOES NOT STATE A CAUSE OF ACTION.

U. S. vs. Seattle Title Trust Co. (C. C. A. 9) 53 F. (2d) 435.

U. S. vs. Barker (C. C. A. 9) 36 F. (2d) 556.

U. S. vs. Rice (C. C. A. 9) 47 F. (2d) 749.

40 Stat. 398; Comp. St. 1918, Comp. St. Ann. Supp. 1919 #514 et seq.

40 Stat. 409, Sec. 402.

Bulletin No. 1, Regulations and Procedure, United States Veterans Bureau, Part 2, pages 1233-1237.

White vs. U. S., 270 U. S. 175.

U. S. vs. Law (C. C. A. 9) 299 F. 61.

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Title 38, U. S. C. A., Sec. 512.

Bulletin No. 3, Regulations and Procedure, United States Veterans Bureau, Part 2, p. 1241, at p. 1265.

Bulletin No. 3, Regulations and Procedure, United States Veterans Bureau, Part 2, p. 1258-1259.

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ARGUMENT.

I.

A COMPLAINT WHICH ALLEGES RECOVERY OF AN ABILITY TO FOLLOW CONTINUOUSLY A SUBSTANTIALLY GAINFUL OCCUPATION IS FATALLY DEFECTIVE AND DOES NOT STATE A CAUSE OF ACTION.

The sole question involved in this appeal is whether or not the appellant has, by his complaint, set forth facts sufficient to constitute a cause of action against the defendant, appellee. The defendant raised the question by demurrer, taking the position that the averments of the complaint plead a total condition which was only temporary. The court was of the same opinion, and his action in sustaining the demurrer, and subsequently dismissing

the action, is assigned as error. The question is one of law, and can easily be discussed under one proposition.

The plaintiff, by his complaint, has limited the duration and continuance of his alleged total disability to the period between October 31, 1918 and January 1, 1929, as is clearly apparent from a reading of the last six lines of Paragraph VI, which are as follows:

> "*and that he was totally and permanently disabled from October* 31, 1918, *until January* 1, 1929. *That by reason thereof he became entitled to receive from the defendant the sum of* $28.75 *per month from October* 31, 1918, *to January* 1, 1929."

It is not the position, or claim, of the plaintiff that he has been permanently and totally disabled since January 1, 1929, or that his complaint alleges, or infers, such to be the fact. On the contrary, he admits that on said date of January 1, 1929, he recovered from his total disability (Appellant's Brief 9) and he specifically states in his Brief that he "did" on said date "actually recover the ability to follow a substantially gainful occupation" (Appellant's Brief 32).

In other words, it is the position of the plaintiff, that even though he has pleaded a recovery from his total disability, almost two years prior to the filing of the complaint, that proper construction of the policies permits his recovery from the defendant at the rate of $57.50 per month beginning on October 31, 1918 and ending January 1, 1929, and that a complaint which alleges permanent and total disability between those dates is sufficient.

According to the statements contained in plaintiff's brief, he is now, and ever since January 1, 1929, has been suffering from a permanent disability, which is only partially disabling (Appellant's Brief 9, 17, 21), and which is not sufficient to prevent him from following continuously a substantially gainful occupation (Appellant's Brief 32).

That the insured cannot recover if he is only partially disabled, though the condition may be permanent, is so well settled that it requires no argument.

> U. S. vs. Seattle Title Trust Co. (C. C. A. 9) 53 F. (2d) 435.
>
> U. S. vs. Barker (C. C. A. 9) 36 F. (2d) 556.
>
> U. S. vs. Rice (C. C. A. 9) 47 F. (2d) 749.

War Risk Insurance policies were issued under the authority of the act amending an act entitled "An Act to Authorize the Establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September 2, 1914, and for other purposes, approved October 6, 1917. (40 Stat. 398; Comp. St. 1918, Comp. St. Ann. Supp. 1919 #514 et seq). Article 4, commencing with Section 400 of the Act (40 Stat. 409) deals with insurance and Section 402 provides, in part:

> "It shall be payable only to a spouse, child, grandchild, parent, brother or sister, *and also during total and permanent disability to the injured person,* or to any or all of them."
>
> (italics ours)

In exercise of the power conferred upon him by the foregoing Act, and following the express direction of Congress, to the effect that he should publish the terms and conditions of insurance contracts, to be issued pursuant to the statute, the Director of the Bureau of War Risk Insurance, under the direction of the Secretary of the Treasury, published, and promulgated, Bulletin No. 1, on October 15, 1917 (Regulations and Procedure United States Veterans Bureau, Part 2, page 1233-1237) which Bulletin contained the terms, conditions, and provisions of all soldiers' and sailors' insurance.

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The policy provided, among other things, that the insurance should be payable—

> "To the insured, if he/she, *while this insurance is in force, shall become totally and permanently disabled,* commencing with such disability as established by the award of the Director of the bureau *and continuing during such disability;*" (Bulletin No. 1, supra, p. 1235).
>
> (italics ours).

On March 9, 1918, the Director of the Bureau of War Risk Insurance, published T. D. 20 W. R., which defines total and permanent disability (Regulations and Procedure, U. S. Veterans Bureau, Part 1, page 9).

Plaintiff's proposition of law No. I, and the discussion thereunder, is directed to the rule of liberality in the construction of pleadings, when attacked by demurrer.

In answer to the argument advanced by plaintiff, we have but to point out the obvious, and fundamental rule, that when a pleading does not allege facts, which will, under the law, entitle the party to relief, or recovery, it is, to use the language of this Court, "so fatally defective that, taking all the facts to be admitted, the Court can say they furnish no cause of action whatever." Sommer vs. Carbon Hill Coal Co. (C. C. A. 9) 89 F. 54 at page 60.

Miller vs. Prout, 33 Ida. 709; 197 Pac. 1023.

In our view of the matter, there is an entire lack of essential allegations, in plaintiff's complaint, to sustain a judgment in his favor.

The definition of total and permanent disability, as contained in T. D. 20 W. R., supra, and approved by the courts, contains two conditions which must be co-existent, before an insured is entitled to the disability benefits of his policy. He must be suffering from an impairment of mind or body, which renders it impossible for him to follow continuously a substantially gainful occupation, *and standing at that point,* the total condition shall be deemed to be permanent, whenever it is founded upon conditions which render it *reasonably* certain that it will continue throughout the life of the person suffering from it.

Manifestly, it is humanly impossible for any physician, or other person, to foretell, with positive certainty, that a physical condition, which he finds at any particular time, has reached a stationary level and will continue permanently to be totally disabling, if it appears to be totally disabling at the time of his examination. For this reason,

the Director of the Bureau of War Risk Insurance wisely provided, in the definition, for a discontinuance of the payment of installments, and a resumption of premium payments, in the event that the insured recovers his ability to follow continuously a substantially gainful occupation.

If, during the life of his policy, an insured person is found to be totally disabled, and looking into the future, scientific principles, reasonably applied, make it probable that the condition will continue through life, he is given the benefit of the provision maturing the policy and is paid by the Government under his contract. The definition of permanent and total disability has been liberally construed by the courts to the end that disability payments on a policy will be initiated when such a situation arises. Congress recognized that medicine is not an exact science, and that nothing is certain, in life, when the saving clause contained in Sec. 512, Title 38, U. S. C. A. (Appellant5s Brief 25, 26) was enacted.

The provision in the statute, above referred to, and contained in the definition, for the discontinuance of installments and the resumption of premium payments, in the event of recovery, is the answer by Congress, and by the Bureau of War Risk Insurance to the question propounded to Judge Mack, at the Conference of officers and enlisted men of the Army and Navy held in Washington, D. C. on October 10-18, 1917, inclusive, which question is quoted in appellant's Brief at pages 28 and 29, and is as follows:

> "A MEMBER: Your statement, Judge, of total and permanent disability—suppose a man is pro-

nounced totally and permanently disabled by a board of physicians, and thereafter it develops that he has recovered somewhat; would he still be considered under that condition, or would that word 'permanent' come in; and if so, what is the affect?

"JUDGE MACK: That is a problem.

"A MEMBER: That's got to be settled.

"JUDGE MACK: *And I think the bureau will settle the problem liberally.*"

(italics ours)

Bulletin No. 3, Regulations and Procedure, United States Veterans Bureau, Part 2, p. 1241, at p. 1265.

The explanation of the War Risk Insurance Act by Judge Mack, as set forth in Bulletin No. 3, supra, was fully approved, and adopted by the Bureau of War Risk Insurance, and plaintiff quotes in his brief the statement of the Director to this effect. (Appellant's Brief 27).

One may look into the future and venture the opinion, that a total disability is *reasonably* certain to continue, and one may also look into the past, and say, based upon the assumed fact that total disability existed at a given time, and taking into consideration subsequent events, *and a present condition which is consistent* with a conclusion as to the ultimate fact, that a total and permanent disability has existed throughout the period.

In this case, however, it is not possible for any person to venture an opinion as to permanent and total disability.

The plaintiff has pleaded and admitted a recovery which antedates by almost two years the filing of his complaint. He was not permanently and totally disabled from October 31, 1918, until January 1, 1929, but if the allegations of his complaint are taken as true, for the purpose of deciding the question raised by demurrer, his total condition was only temporary. That he has pleaded a chronic condition, as stated in his Brief, which is reasonably certain to continue throughout his life, is not material.

The plaintiff has asked, in his Brief (Appellant's Brief 24) why the statute provides that total and permanent disability benefits shall be payable to the injured person *"during total and permanent disability,"* if it is not meant by that phrase that he can now, though recovered from his total and permanent condition, receive the benefits of his policy during the period that he alleges he was totally disabled, and he argues that Congress did not intend permanent, as used in the definition, to mean everlasting and forever.

The statute, Sec. 402 of the Act (40 Stat. 409), provides that the insurance shall be payable in 240 equal monthly installments, and the policy as set forth in Bulletin No. 1, supra, at page 1235, provides:

> "To the beneficiary or beneficiaries hereinafter designated, commencing upon the death of the insured, while the insurance is in force, and (except as otherwise provided) continuing for 240 months if no installments have been paid for total and permanent

disability or if any such installments have been paid, then for a number of months sufficient to make 240 in all;"

As will be noted by quotations, hereinbefore set out, the statute contains the expression, with respect to the payment of permanent and total disability benefits to the insured, "*and also during total and permanent disability to the injured person*," while the policy itself, in connection with this feature, uses the words "*and continuing during such disability.*"

These words in the statute, and in the policy, guarantee that a person becoming permanently and totally disabled, will continue to receive disability benefits as provided by the policy, as long as he lives, or as long as permanent and total disability continues, even though such monthly payments may exceed 240, as in the case of maturity by reason of death. A beneficiary of a war risk insurance policy cannot, under the statute, receive more than 240 equal monthly installments, and if an insured dies, after his policy has been matured by reason of permanent and total disability, the beneficiary will receive only the difference between the installments paid the insured, and the total number of 240. However, a man properly determined to be permanently and totally disabled, while his contract is in force, is entitled to, and will receive his monthly installments, as long as the condition endures, notwithstanding the limit to the number of installments to be paid for other contingencies. This is the explanation contained in Bul-

letin No. 3, supra, cited by appellant (Appellant's Brief 28, 29), wherein Judge Mack says at pages 1258-1259:

> "Now, in its solicitude for the men and for the families, and acting—and properly acting—in a somewhat paternal manner, the Government has provided that you can not get this insurance paid out in a lump sum, and that your family can not get this insurance paid out in a lump sum. It is not only free from creditors, but it is going to be paid out only in monthly installments over a period of 20 years, which means 240 monthly installments. *If, however, you become totally disabled and the total disability continues more than 20 years, the same monthly installments will be kept up for you as long as the disability continues.*"
>
> (italics ours)

This, we believe, fully answers appellant's query.

Appellant has cited and quoted from Regulation No. 57, Regulations & Procedure, United States Veterans Bureau, Part I, p. 54, for the purpose of arguing that one having a continuous total disability for a period of six months, is regarded by the Bureau as being entitled to the benefits of his policy. This regulation was promulgated in furtherance of the liberal policy to make it possible for a man to receive the total disability benefits of his contract, at the earliest possible moment, consistent with the statute and the policy itself. The regulation provides for a presumption of total and permanent disability where an

insured has been in a hospital or asylum for six months or more, or carries a rating of total or total temporary for a period of six months or more, and is unable to follow continuously a substantially gainful occupation during such six months, and in addition, at the time of the medical examination, which is a condition precedent to the finding of total and permanent disability, under the regulation, shall be found to be in such a physical or mental condition, as to require further hospitalization, or otherwise unable to collow continuously a substantially gainful occupation. *However,* and this was overlooked by appellant in his Brief, the regulation provides further:

> *"Before the disabled person shall be rated totally and permanently disabled under the preceding paragraph, a medical examination shall be conducted for the purpose of ascertaining his or her true physical and mental condition, and in addition all facts as to his or her ability to engage continuously in a substantially gainful occupation shall be procured."*
> (italics ours)

Regulation 57, Regulations and Procedure, United States Veterans Bureau, Part I, p. 54, at p. 55.

It will thus be noted, that it has always been the policy of the Bureau, to grant total and permanent disability benefits, *whenever total disability "is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it."*

If, *at the date the disability is determined to be total*, a prognosis based upon reason, makes probable the continuance of the condition at a stationary level, then, and then only, are benefits payable.

While no decision is to be found in which this precise point is raised, all of the decided cases on war risk insurance hold that a man must be unable to follow continuously a substantially gainful occupation, before he is entitled to recover on his policy, and this without jeopardy to his life and health.

In the case of U. S. vs. Fly, decided by the Eighth Circuit Court of Appeals and reported in 58 F. (2d) at page 217, the evidence presents a picture of inaptitude, and physical inability to follow continuously a substantially gainful occupation from date of discharge from the Army until April 1929, to such an extent, that the Circuit Court would have affirmed the action of the trial court, in letting the case go to the jury, if it had not been for the fact that in April 1929, plaintiff became employed at a job which continued for 18 months. With respect to plaintiff's rights, as affected by his ability to work at the time of trial, the court says:

> "There is conflict in the evidence as to appellee's condition and actions up to his final return to Marshfield in April, 1929. If the matter stopped there we would hesitate, giving him every advantage in the evidence, to say there was no substantial evidence to sustain the verdict because, taking that view of the evidence, it might be said that he had repeatedly tried

various ways of making a living and had found himself unable to continue in any of them. But the matter does not stop there. *This brings us to the fact which is determinative.*

"*That fact is that for eighteen months before and at the time of trial he had been continuously employed* by W. T. McMahan, at Marshfield, as a helper and in general work around his undertaking establishment *at a normal wage.*'" (at p. 218)

It is quite evident that appellee has been and is under a considerable handicap because of his condition brought about by his injuries, and is suffering a decided disability which may be permanent. *But how can this court say that such disability is total, to the extent that it prevents him from 'following continuously any substantially gainful occupation,' when the undisputed evidence of the appellee, his wife, and his employer agree that he was at the time of trial and for eighteen months had been steadily employed at normal wages and had, in the words of his employer, 'performed his work there with me satisfactorily,'* with absences of only about a week, caused by sickness? The evident injury to appellee and the highly meritorious service origin of this injury have inclined us to view this record with lively sympathy; but our duty is to take the evidence as we find it and to enforce the rights of these parties as defined by their contract. That contract required total injury before recovery could be lawfully had. This evidence clear-

ly and unmistakably shows no such total injury. The motion for an instructed verdict should have been sustained." (at p. 219)

(italics ours)

The Fifth Circuit Court of Appeals has also said that total and permanent disability must be continuing, to entitle an insured to recover under one of these policies.

"*Further, this evidence must not merely show that he was at the time of his discharge totally disabled, but that he has continued and will continue to be so,* not as the result of successive maladies making their onset from time to time, but as the result of the same malady, which then totally disabling, has continued and will continue permanently to be so."

U. S. v. Crume (C. C. A. 5), 54 F. (2d) 556, at page 558.

(italics ours)

It is clear from the foregoing authorities, that a pleading which alleges recovery from total disability almost two years prior to the date of filing, is wholly lacking in allegations essential to support a judgment.

Appellant's position is entirely inconsistent with the law of war risk insurance, as it is written in the innumerable decisions of appellate courts. If this plaintiff had alleged in his complaint, that he is now, and ever since the date of October 31, 1918, which was within the life of his policy, has been totally and permanently disabled, by reason of the diseases, disabilities, and injuries enumerated in his

complaint, and if, during the actual trial of the case it had developed that since January 1, 1929, the plaintiff has been able to follow continuously a substantially gainful occupation, without impairment to his health, *it would have been the duty of the court to direct a verdict for the government.* Earning capacity, employability, the ability to follow an occupation in the normal way, without serious detriment to health, is the test, and when the proof develops the ability of the insured to follow an occupation and obtain a gainful wage, the jury should be instructed to return a verdict for the government.

Where is the distinction between that case wherein it develops, as a matter of proof, at trial, that the insured has recovered his ability to work, and this case, wherein it is admitted by the pleadings that the plaintiff is no longer totally disabled. In one case the proof is fatal to his claim, in the other the admission bars any right to recovery.

In some of the decided cases, it appears that the proof has establishd an ability to follow continuously a substantially gainful occupation immediately upon the discharge of the insured from military service; in others, the proof develops such a capacity at a much later date, but in all such cases, the appellate courts have held, without exception, that recovery cannot be had by the insured.

To adopt appellant's theory is to strip the word "permanent" of any meaning whatever, and to classify it as surplusage in the definition and in the statute. If Congress had intended that an insured could receive disability

benefits upon his policy by reason of total disability, which need not be permanent, it would have so expressed itself in the statute, and the Bureau would have expressly provided in the definition, or by regulation, that installments would become due upon the showing of a total disability.

Provision was made by the Bureau, by Regulation 5-A, promulgated June 26, 1922 (Regulations and Procedure, U. S. V. B., Part 1, page 76) for a waiver of premiums due upon renewable term insurance, and United States Government life insurance (converted insurance), pursuant to application therefor by the insured, in the case of and during temporary total disability. The portions of that regulation applicable here are as follows:

> "1. Subject to the conditions hereinafter set out, the yearly renewable term insurance and United States Government life insurance (converted insurance) shall be deemed not to lapse by reason of the nonpayment of premiums on the due date thereof, and unless paid by the insured, payment of such premiums on the due date thereof shall be waived, in the cases of the following persons: (a) Those who are confined in a hospital as patients of the United States Veterans' Bureau for a compensable disability during the period while so confined; (b) *those who are rated temporarily totally disabled by reason of an injury or disease entitling them to compensation, during the period of such total disability and while they are so rated.*"
>
> (italics ours)

The same provision is to be found in Regulation No. 40 (Regulations and Procedure, U. S. V. B., Part 1, page 112), which amends Regulation 5-A, and Regulation No. 77, September 3, 1924 (Regulations and Procedure, U. S. V. B., Part 1, p. 135), which amends and supersedes Regulation No. 40. In other words, during temporary total disability, the insured could, by complying with the regulations, have his premium waived, but only during total and permanent disability could he receive the benefits of his policy in the form of monthly installments to be paid, as in the case of maturity by death.

Furthermore, Congress, on July 3, 1930, enacted a total disability statute for United States Government life insurance (converted insurance) which makes the distinction between temporary total and permanent total disability clear and unequivocal. This statute provides in part:

> "The director is hereby authorized and directed to include in United States Government life (converted) insurance policies provision whereby an insured, who is totally disabled as a result of disease or injury for a period of four consecutive months or more before attaining the age of sixty-five years and before default in payment of any premium, shall be paid disability benefits at the rate of $5.75 monthly for each $1,000 of converted insurance in force when total disability benefits become payable.
>
> *The amount of such monthly payment under the provisions of this section shall not be reduced because of payment of permanent and total disability*

benefits under the United States Government life (converted) insurance policy. Such payments shall be effective as of the first day of the fifth consecutive month, *and shall be made monthly during the continuance of such total disability. Such payments shall be concurrent with or independent of permanent total disability benefits under the United States Government life (converted) insurance policy.* In addition to the monthly disability benefits the payment of premiums on the United States Government life (converted) insurance policy and for the total disability benefits authorized by this section shall be waived during the continuance of such total disability. Regulations shall provide for re-examinations of beneficiaries under this section; *and, in the event that it is found that an insured is no longer totally disabled, the waiver of premiums and payment of benefits shall cease and the United States Government Life (converted) insurance policy, including the total disability provision authorized by this section, may be continued by payment of premiums as provided in said policy* and *the total disability provision authorized by this section.* Neither the dividends nor the amount payable in any settlement under any United States Government Life (converted) insurance policy shall be decreased because of disability benefits granted under the provisions of this section. The payment of total disability benefits *shall not prejudice the right of any insured, who is totally and permanently disabled, to*

total permanent disability benefits under his United States Government Life (converted) insurance policy;"

(italics ours)

Title 38, U. S. C. A., Sec. 512b.

The foregoing section of the statute proves beyond peradventure of doubt, that Congress had in mind very definitely a difference between a total disability which was only temporary and a total disability of a permanent nature. As in many commercial policies, such as Penn Mutual Life Insurance Company vs. Milton, cited by Appellant (Brief 36-38), it is provided by this late statute, that proof of the continuance of the condition for a comparatively short time, in this case four months, will entitle the insured to total disability benefits during the existence of the condition, premiums being waived coincident therewith. It is definitely provided by the statute that total and permanent benefits are a distinct benefit based upon entirely different considerations.

In other words, when Sec. 512b, above quoted, was, on July 3, 1930, added to Section 512, Title 38, U. S. C. A., as enacted June 7, 1924, Congress was convinced that it would be necessary to specifically add legislation to that already in existence, before an insured could receive any benefits for a total disability which could not reasonably be determined as permanent by looking into the future from that point. If Congress did not construe total and permanent disability as we construe it herein, why was it necessary to enact Section 512b?

The appellant has cited several state cases dealing with commercial insurance, as authority for his position. If we assume, for the sake of argument, that the cases cited, correctly state the law of the jurisdictions in which they arose, still they have no application here, and the principles announced therein are not tenable as aiding in the construction of a war risk insurance policy issued by the government.

As to the application of principles of law governing commercial insurance, District Judge Pollock of the District Court of Kansas, First Division, has the following to say:

> "*and the authorities being uniform to the effect that 'war risk insurance is a special statutory kind of insurance, and contracts issued thereunder are not to be interpreted and construed according to the principles of law governing accident insurance, or other contracts of insurance'.*"
>
> (italics ours)
>
> Bean vs. U. S. 7 F. (2d) 393, at p. 396.

The Eighth Circuit Court of Appeals classifies war risk insurance as a special kind of insurance, not governed by the same principles as ordinary insurance, in the following language:

> "The government in devising and putting in effect its plan of war risk insurance did not enter the field of business in the accepted sense for commercial purposes and pecuniary gain, and therefore does not

stand in the same relation to the insured as do ordinary insurance companies. It can be held only to the extent that it has expressly consented to be held upon contracts of this nature."

Birmingham v. U. S. (C. C. A. 8), 4 F. (2d) 508, at p. 509.

This court has, in very strong language, distinguished war risk insurance contracts from commercial policies, and held that the legal principles governing ordinary insurance are not relevant in the construction of a government policy.

"*We have considered the cited cases which involve the interpretation of accident insurance contracts. They are not controlling, for war risk insurance is of a materially different character, being in large part based upon considerations other than those which enter into a purely business relationship of accident indemnity contracts.* The distinction has been recognized by the Comptroller of the Treasury, who has pointed out that war risk insurance established by the statute is not an out and out contract of insurance on an ordinary business basis, nor yet a pension, but that 'it partakes of the nature of both.' Decision of Comptroller, July 5, 1919; Caserello v. United States (D. C.) 271 Fed. 488. A liberal construction of the statute should be adopted, but, of course, the courts always are bound by the limitations of the statute and by regulations properly made by the director,

pursuant to the authority conferred by the law. Helmholz v. Horst (C. C. A.) 294 Fed. 417."

(italics ours)

U. S. vs. Law, 299 F. 61, at p. 65 (reversed on other grounds, 266 U. S. 494)

See also:

U. S. vs. Lyke (C. C. A. 9) 19 F. (2d) 876.

White vs. U. S., 270 U. S. 175.

U. S. vs. Cox (C. C. A. 5) 24 F. (2d) 944.

Then, too, it appears, that the contract, in the case of Penn Mutual Life Insurance Company vs. Milton, 127 S. E. 140, cited by appellant, provides definitely that payment of total disability benefits shall become due upon a showing that total disability has continued for 60 days, and this was the controlling reason for the decision of the court, to the effect that a disability which lasted for only 16 months should be construed as permanent, within the meaning of the policy. This feature of the policy alone sets it apart from war risk insurance and makes the case inapplicable here.

In the Wenstrom vs. Aetna Life Insurance Company case, 215 N. W. 93, cited by appellant, the plaintiff therein had not recovered from his alleged disability at the time of trial. In fact, he was on crutches, and the principal question decided in the case was whether or not there was

sufficient evidence of present total and permanent disability to go to the jury. Other questions decided by the court related to notice to the insurance company, and the right of the insured to recover premiums. Appellant cannot, therefore, argue that this case is, in any respect, authority for his position in the instant case.

Aside from the fact, then, that cases relating to ordinary commercial insurance, are not applicable in the construction of government insurance policies, both of the cases cited by the appellant, are easily distinguished from, and hopelessly at variance with, the facts in our case.

The appellant suggests in his brief that a denial of his position will result in discrimination (Appellant's Brief 33), and by quoting from a letter written by W. G. McAdoo in July, 1917 (Appellant's Brief, 23) allows the question of sympathy and sentiment to creep into his argument of a purely legal proposition. It is not discrimination, to say to a man that has fully recovered from an inability to follow an occupation continuously, that he cannot obtain judgment for something that he never had. To adopt appellant's theory would throw open the doors to thousands of men who served in the military forces of the United States, and who are now clearly able to pursue their vocations, though they may, in the past, have suffered from some malady, which then totally disabled

them. Compensation for disability was provided by Congress at the same time that provision was made for insurance, and it was not intended that one should be substituted for the other.

Respectfully,

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WILLIAM H. LANGROISE.
Assistant U. S. Attorneys for the District of Idaho,

Attorneys for Defendant, Appellee.

No. 6832

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of

SABURO HIGA,

On Habeas Corpus.

SABURO HIGA,

Appellant,

vs.

A. E. BURNETT, District Director, United States Immigration Service, District No. 31,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Appellant:

J. EDWARD KEATING, Esq.,

THEODORE E. BOWEN, Esq.,

Chapman Building, Los Angeles, California.

For Appellee:

SAMUEL W. McNABB, Esq.,

United States Attorney;

P. V. DAVIS, Esq.,

Assistant United States Attorney,

Federal Building, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of)
SABURO HIGA)
On Habeas Corpus.)

No. 10506-J.

CITATION.

To A. E. BURNETT, District Director, United States Immigration Service, District No. 31: GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 15 day of July, 1932, pursuant to an Order Allowing Appeal, filed in the Clerk's office of the District Court of the United States, in and for the Southern District of California, in that certain proceedings known as In the Matter of SABURO HIGA, On Habeas Corpus, No. 10506-J, and you are ordered to show cause, if any there be, why the judgment in the said cause mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Wm. P. James, United States District Judge for the Southern District of California, this 16 day of June, 1932, and of the Independence of the United States, the one hundred and fifty-*fifth*.

Wm. P. James
United States District Judge for the Southern District of California.

[Endorsed]: No. 10506-J. In the United States District Court, in and for the Southern District of California, Central Division. In the matter of Saburo Higa, on habeas corpus. Citation. Received copy of the within Citation this 16 day of June, 1932. P. V. Davis, attorney for appellee. Filed Jun. 16, 1932. R. S. Zimmerman Clerk, by G. J. Murphy, Deputy Clerk. J. Edward Keating and Theodore E. Bowen, attorneys at law, 1212 Chapman Building, Los Angeles, Cal. Trinity 7033, attorneys for petitioner & appellant.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

IN THE MATTER OF THE APPLICATION OF SABURO HIGA, ALIEN, FOR WRIT OF HABEAS CORPUS,	PETITION FOR WRIT OF HABEAS CORPUS

To the United States District Court, Southern District of California;

The petition of Saburo Higa respectfully shows:

That Saburo Higa is imprisoned, detained, confined and restrained of his liberty by Walter E. Carr, United States Immigrant Ins*p*ector in Charge for the district of Southern California, in the City of Los Angeles, State of California; that said imprisonment, detention and confinement are illegal; that the illegality thereof consists of this:

That petitioner applied for admission to the United States, as a student, and was admitted as such. He at-

tended the University of Washington for three years, and has about a year and a half to finish. He worked during the vacation of 1930, and feeling mentally fatigued, decided not to attend school until the following term. He left this message with the Registrar of students at the University of Washington, and intended to return for the fall term of 1931. In the meantime he had worked at several places for short periods to secure a little money with which to carry on his education and on which to live. He worked about four months, except for the Summer vacation period. Because he was found working, the inspector arrested him. A hearing was had, and the Inspector recommended that he be deported on the ground he had failed to maintain his status as a student. This contention was upheld by the Department of Labor. It is earnestly contended that there is no evidence to show that he abandoned his status as a student or sustain the finding of the Inspector to that effect; That he is wrongfully now imprisoned and detained by Walter E. Carr, who threatens to deport him on or about July 20, 1931, and to put him on a boat bound for Japan on or about said date. That unless a Writ of Habeas Corpus is issued forthwith, said petitioner will be deported on or about July 20, 1931, and will not be able to present the matter to this Honorable Court.

That said Saburo Higa is not held by virtue of any complaint, indictment, presentment, warrant, quarantine law, rule, regulation or order except as above specifically set out; that no other applications for a Writ of Habeas Corpus have been made by or on behalf of petitioner.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus may be granted directed to said Walter E. Carr, commanding him to have the body of Saburo Higa before this court at a time and place therein to be specified, to do and receive what shall then and there be considered by said Court concerning said Saburo Higa, together with the time and cause of his detention, and said writ; and that said Saburo Higa may be restored to his liberty.

Dated: July 15 1931.

Saburo Higa
Petitioner

J. Marion Wright
Attorney for Petitioner

State of California, }
} ss.
County of Los Angeles, }

SABURO HIGA being by me first duly sworn, deposes and says: That he is the Petitioner in the above entitled action; that he has heard read the foregoing Petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

Saburo Higa

Subscribed and sworn to before me this 15 day of July, 1931.

[Seal] John M. Yahiro,

Notary public in and for the County of Los Angeles, State of California.

My Commission Expires March 23, 1935.

[Endorsed]: Original No. 10506-J. In the District Court of the United States Southern District Central Division In the Matter of the Application of Saburo Higa, Alien, for Writ of Habeas Corpus Petition for Writ of Habeas Corpus Received copy of the within this 17 day of July, 1930 A Del Guercio Attorney for U. S. I. S. Filed Jul 15 1931 R. S. Zimmerman, Clerk By G. J. Murphy, Deputy Clerk J. Marion Wright 1027 Citizens National Bank Bldg. Los Angeles FAber 1969 Attorney for Petitioner

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IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

IN THE MATTER OF THE APPLICATION OF SABURO HIGA, ALIEN, FOR WRIT OF HABEAS CORPUS.	) ORDER FOR THE ISSURANCE OF WRIT AND FIXING BAIL

Let the Writ issue as prayed for, returnable before this court in Court room of Judge James on July 27, 1931, at ten o'clock a. m., and in the meantime, the petitioner may be admitted to bail upon giving bail in the sum of $1000.00, which bail shall first be approved by the Court.

Dated: July 16th, 1931.

Paul J. McCormick
United States District Judge

[Endorsed]: Original No. 10506J In the District Court of the United States Southern District of California Central Division In the Matter of the Application of Saburo Higa, Alien, for Writ of

Habeas Corpus Order for the Issuance of Writ and Fixing Bail Filed Jul 15 1931 R. S. Zimmerman, Clerk by G. J. Murphy, Deputy Clerk Received copy of the within............this 17 day of July 193.... A. Del Guercio U. S. I. S. J. Marion Wright 1027 Citizens National Bank Bldg. Los Angeles FAber 1969 Attorney for Petitioner.

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

IN THE MATTER OF THE)
APPLICATION OF SABURO) WRIT OF
HIGA, ALIEN, FOR WRIT) HABEAS CORPUS
OF HABEAS CORPUS.)

THE UNITED STATES OF AMERICA TO WALTER E. CARR, UNITED STATES IMMIGRANT INSPECTOR, GREETINGS:

WE COMMAND YOU that you have the body of Saburo Higa, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said Saburo Higa shall be called or charged, before the Honorable Wm. P. James, a judge of the United States District Court in and for the Southern District of California, Central Division, at his court room in the Federal Building, Los Angeles, California, on the 27th day of July, 1931, at ten o'clock a. m. of that day, to do and receive what shall then and there be considered concerning said Saburo Higa. And have you then and there this writ.

WITNESS, the Honorable Wm. P. James, Judge of the United States District Court, this 15th day of July, 1931.

ATTEST my hand and the seal of said Court the day and year last above written.

[Seal] R. S. Zimmerman
Clerk of the above entitled Court
By G. J. Murphy, Deputy

[Endorsed]: Original No. 10506J In the District Court of the United States Southern District of California Central Division In the Matter of the Application of Saburo Higa, Alien, for Writ of Habeas Corpus Writ of Habeas Corpus. Filed Jul 15 1931 R. S. Zimmerman, Clerk By G. J. Murphy, Deputy Clerk Received copy of the within .... this 17 day of July, 193.... A. Del Guercio U. S. I. S. J. Marion Wright 1027 Citizens National Bank Bldg. Los Angeles FAber 1969 Attorney for Petitioner

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IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of)
SABURO HIGA)
On Habeas Corpus)

No. 10506-J
RETURN TO WRIT OF HABEAS CORPUS

I, WALTER E. CARR, District Director of Immigration at Los Angeles, California, Respondent herein, for my Return to Writ of Habeas Corpus heretofore issued, deny that I am unlawfully imprisoning, detaining, confining and restraining of his liberty Saburo Higa, Pe-

titioner herein. Said Petitioner is now at liberty under bond furnished *by* this Honorable Court. It is impossible, therefore for Respondent to produce said Petitioner in this Honorable Court on this, the 27th day of July, 1931 in compliance with Writ of Habeas Corpus issued herein.

While denying that he is unlawfully imprisoning, detaining, confining and restraining the aforesaid Petitioner of his liberty, Respondent admits that he holds a warrant issued by the Assistant Secretary of Labor, on the 6th day of July 1931 directing Respondent to deport said Petitioner to Japan, the country whence he came and Respondent was preparing to execute the warrant of deportation when this Habeas Corpus proceeding was instituted. Copy of said warrant of deportation i*f* attached hereto.

WALTER E. CARR
Walter E. Carr
District Director of Immigration
Los Angeles, California Respondent

WARRANT—DEPORTATION OF ALIEN
UNITED STATES OF AMERICA
DEPARTMENT OF LABOR COPY
WASHINGTON

No. 31270/2777
To: 55755/758

DISTRICT DIRECTOR OF IMMIGRATION, Los Angeles, Calif., COMMISSIONER OF IMMIGRATION, Angel Island Station, San Francisco, Calif.

Or to any Officer or Employee of the United States Immigration Service.

WHEREAS, from proofs submitted to me, Assistant to the Secretary, after due hearing before Immigrant

Inspector Albert Del Guercio, held at Los Angeles, Calif., I have become satisfied that the alien SABURO HIGA, who landed at the port of Seattle, Wash., on the 15th day of September, 1927 has been found in the United States in violation of the immigration act of May 26, 1924, to wit:

That he has remained in the United States after failing to maintain the exempt status of student under which he was admitted. and may be deported in accordance therewith:

I, F. F. SNYDER, Assistant to the Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United tSates, do hereby command you to return the said alien to Japan the country whence he came, at the expense of the appropriation, "Salaries and Expenses, Bureau of Immigration, 1932", including the expenses of an attendant, if necessary.

For so doing, this shall be your sufficient warrant.

WITNESS my hand and seal this 6th day of July, 1931

....

Assistant to the Secretary of Labor

[Endorsed]: No. 10506-J-Cr. In the District Court of the United States for the Southern District of California Central Division United States of America vs. Saburo Higa Return to Writ of Habeas Corpus Filed July 27, 1931 R. S. Zimmerman, Clerk By Murray E. Wire, Deputy

At a stated term, to wit: The FEBRUARY Term, A. D. 1932, of the District Court of the United States of America, within and for the CENTRAL Division of the Southern District of California, held at the Court Room thereof, in the City of LOS ANGELES on FRIDAY the 18th day of MARCH in the year of our Lord one thousand nine hundred and thirty-two

Present:

The Honorable WM. P. JAMES, District Judge.

In the Matter of the petition)
of Saburo Higa) No. 10,506-J-Crim.
for habeas corpus)

Petitioner herein having heretofore presented his petition asking that he be discharged from the custody of the immigration officers, and the issues presented by said petition and the return as made by the Immigration Department having been considered and submitted to the court for decision after argument of counsel, and the court having examined the same and being advised in the premises now orders that the petition of Saburo Higa be, and it is denied and the petitioner is remanded to the custody of the officers of the Immigration Department.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of) No. 10506-J.
SABURO HIGA,) PETITION FOR APPEAL.
On Habeas Corpus.)
——————————-)

SABURO HIGA, petitioner above named, deeming himself aggrieved by the order and judgment entered herein on the 18th day of March, 1932, does hereby appeal from said order and judgment to the United

States Circuit Court of Appeals, for the Ninth Circuit, and prays that a transcript and record of proceedings and papers on which said order and judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Judicial Circuit of the United States.

DATED: June 16, 1932.

J. Edw. Keating
J. Edward Keating
and
Theodore E. Bowen
Theodore E. Bowen
Attorneys for Petitioner.

[Endorsed]: No.10506-J. In the United States District Court, in and for the Southern District of California, Central Division. In the Matter of Saburo Higa, on habeas corpus Petition for Appeal. Received copy of the within Petition this 16 day of June, 1932. P. V. Davis, attorney for appellee. Filed Jun. 16, 1932. R. S. Zimmerman, Clerk, by G. J. Murphy, Deputy Clerk. J. Edward Keating and Theodore E. Bowen, attorneys at law 1212 Chapman Building, Los Angeles, Cal. Trinity 7033. Attorneys for petitioner & appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of)
SABURO HIGA,)
On Habeas Corpus.)

No. 10506-J.
ASSIGNMENTS OF ERROR.

Comes now Saburo Higa, petitioner herein, and assigns error in the decision of the said District Court for the Southern District of California, Central Division, as follows:

I.

The court erred in remanding Saburo Higa to the custody of the United States Immigration Service for deportation.

II.

The court erred in holding and deciding that the writ of habeas corpus should be dismissed and discharged.

III.

The court erred in holding and deciding that there was some evidence to sustain the findings upon which the warrant of the Secretary of Labor of the United States for the deportation of Saburo Higa was based.

IV.

The court erred in holding and deciding that Saburo Higa was given a fair hearing before the United States Immigration Service.

V.

The court erred in holding and deciding that Saburo Higa had overstayed his time in the United States.

VI.

The court erred in holding and deciding that the findings upon which the warrant of deportation is based are sufficient to sustain said warrant of deportation.

VII.

The court erred in holding and deciding that Saburo Higa was not a bona fide student and entitled to remain in the United States as such.

DATED: June 16, 1932.

J. Edw Keating
J. Edward Keating
and
Theodore E. Bowen
Theodore E. Bowen
Attorneys for Petitioner

[Endorsed]: No. 10506-J. In the United States District Court, in and for the Southern District of California, Central Division. In the Matter of Saburo Higa, on habeas corpus. Assignments of Error. Received copy of the within Assignments of Error this 16 day of June, 1932. P. V. Davis, attorney for appellee. Filed Jun. 16, 1932. R. S. Zimmerman, Clerk, by G. J. Murphy, Deputy Clerk. J. Edward Keating and Theodore E. Bowen, attorneys at law 1212 Chapman Building Los Angeles, Cal. Trinity 7033, Attorneys for petitioner & appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of)
SABURO HIGA,)
On Habeas Corpus.)

No. 10506-J.

ORDER ALLOWING APPEAL AND FIXING CUSTODY OF SABURO HIGA.

Now, to-wit, on the 16 day of June, 1932, it is ordered that the appeal be allowed as prayed for; and it is further ordered that Saburo Higa, pending said appeal, shall be released upon the giving of a good and sufficient bond in the sum of One Thousand Dollars ($1,000.00).

It is further ordered that the amount of cost bond on said appeal be, and hereby is, fixed in the sum of Two Hundred Fifty Dollars ($250.00), to be conditioned as required by law and the rules of this court.

Done in open court this 16 day of June, 1932.

Wm. P. James,
Judge.

[Endorsed]: No. 10506-J. In the United States District Court, in and for the Southern District of California, Central Division. In the Matter of Saburo Higa, on habeas corpus. Order Allowing Appeal and Fixing Custody of Saburo Higa. Received copy of the within Order Allowing Appeal this 16 day of June, 1932. P. V. Davis, Attorney for Appellee. Filed Jun. 16, 1932. R. S. Zimmerman, Clerk, by G. J. Murphy, Deputy Clerk. J. Edward Keating and Theodore E. Bowen, Attorneys at law, 1212 Chapman Building, Los Angeles, Cal. Trinity 7033, Attorneys for petitioner & appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of SABURO HIGA, On Habeas Corpus.	No. 10506-J. STIPULATION REGARDING ORIGINAL RECORDS AND FILES OF DEPARTMENT OF LABOR.

IT IS HEREBY STIPULATED AND AGREED by and between J. Edward Keating and Theodore E. Bowen, Attorneys for Saburo Higa, appellant, and S. W. McNabb, Attorney for A. E. Burnett, District Director of the Immigration Service, Appellee, that the original files and records of the Department of Labor covering the deportation proceedings against the petitioner, which were filed in the hearing in the above entitled cause, may be by the Clerk of this Court sent up to the Clerk of the Circuit Court of Appeals for the Ninth Circuit,

as part of the Appellate record, in order that the said original immigration files may be considered by the Circuit Court of Appeals for the Ninth Circuit in lieu of a certified copy of said records and files and that said original records may be transmitted as part of the Appellate record.

DATED: June 16, 1932.

J. Edw. Keating
J. Edward Keating
and
Theodore E. Bowen
Theodore E. Bowen
Attorneys for Petitioner and Appellant.

S. W. McNABB, U. S. Attorney
By P. V. Davis
Assistant U. S. Attorney
Attorney for Respondent and Appellee.

[Endorsed]: No. 10506-J. In the United States District Court in and for the Southern District of California, Central Division. In the Matter of Saburo Higa, on habeas corpus Stipulation Regarding Original Records and Files of Department of Labor Received copy of the within this 16 day of June, 1932 P. V. Davis, Asst. U. S. Atty. Filed Jun 16, 1932 R. S. Zimmerman, Clerk, by G. J. Murphy Deputy Clerk. J. Edward Keating and Theodore E. Bowen, attorneys at law, 1212 Chapman Building, Los Angeles, Cal. Trinity 7033, Attorneys for petitioner & appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of SABURO HIGA, On Habeas Corpus.	No. 10506-J. ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS.

ON STIPULATION OF COUNSEL, it is by the court ordered that the original records in the United States Immigration office filed herein on the hearing of the return of the respondent, A. E. Burnett, District Director of the United States Immigration Service, to the writ of habeas corpus, be transmitted by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit, as original exhibits in lieu of a certified copy of said records and files and that the same need not be printed.

DATED: June 16, 1932.

Wm. P. James

United States District Judge

[Endorsed]: No. 10506-J. In the United States District Court in and for the Southern District of California, Central Division. In the Matter of Saburo Higa, on habeas corpus Order for Transmission of Original Exhibits. Received copy of the within Order this 16 day of June, 1932 P. V. Davis, Attorney for Appellee. Filed Jun 16, 1932 R. S. Zimmerman, Clerk, by G. J. Murphy Deputy Clerk. J. Edward Keating and Theodore E. Bowen, attorneys at law, 1212 Chapman Building, Los Angeles, Cal. Trinity 7033, Attorneys for petitioner & appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of)
SABURO HIGA) No. 10506-J
on Writ of Habeas Corpus) BAIL BOND PENDING APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, PUBLIC INDEMNITY COMPANY, a NEW JERSEY CORPORATION, is held and firmly bound unto A. E. Burnett, District Director of District No. 31, Immigration Service, and the United States of America, in the full and just sum of ONE THOUSAND & NO/100 ($1000.00) DOLLARS, to be paid to the said A. E. Burnett, District Director *Director* aforesaid, and the United States of America, or their certain attorney, executors, administrators or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents:

Sealed with our seal and dated this 17th day of June, 1932.

WHEREAS, lately the District Court of the United States for the Southern District of California, Central Division, in a habeas corpus proceeding in said Court between petitioner SABURO HIGA, and the respondent, A. E. Burnett, District Director of Immigration, wherein an order, judgment and decree was rendered against the said SABURO HIGA, discharging the Writ of Habeas

Corpus and remanding the said alien SABURO HIGA to the custody of respondent A. E. Burnett, and the said SABURO HIGA having obtained from said court an appeal to reverse the order, judgment and decree in the aforesaid habeas corpus proceedings, and a citation directed to the said A. E. Burnett, District Director as aforesaid, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California, on the.........day of............1932.

NOW, the condition of the above obligation is such that if the said order, judgment and decree be affirmed, the said SABURO HIGA will surrender himself to A. E. Burnett District Director aforesaid, then this recognizance to be void, otherwise to remain in full force and virtue.

PUBLIC INDEMNITY COMPANY,
A NEW JERSEY CORPORATION

[Seal] By Samuel Silverman
Attorney-in-Fact

I hereby approve the foregoing bond.

Dated the 17 day of June 1932.

Wm. P. James
Judge or Clerk

[Endorsed]: No. 10506-J In the District Court of the United States in and for the Southern District of California Central Division Bail Bond on Appeal $1000.00 Dated May 17th, 1932. Public Indemnity Company. Surety. Filed Jun 17 1932 R. S. Zimmerman, Clerk by G. J. Murphy, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

In the Matter of)
SABURO HIGA)
On Habeas Corpus.)

No. 10506-J.
COST BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:.

That the undersigned, PUBLIC INDEMNITY COMPANY, A NEW JERSEY CORPORATION, is held and firmly bound unto A. E. Burnett, District Director of District No. 31, Immigration Service, and the United States of America, in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said A. E. Burnett, District Director aforesaid, and the United States of America, or their certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 17th day of June, 1932.

WHEREAS, lately the District Court of the United States, for the Southern District of California, Central Division, in a habeas corpus proceeding in said Court between petitioner, SABURO HIGA, and the respondent A. E. Burnett, District Director of Immigration as aforesaid, wherein an order, judgment and decree was rendered against the said SABURO HIGA, discharging

the Writ of Habeas Corpus and remanding the said alien, SABURO HIGA, to the custody of respondent A. E. Burnett; and the said SABURO HIGA having obtained from said Court an appeal to reverse the order, judgment and decree in the aforesaid Habeas Corpus proceeding, and a Citation directed to the said A. E. Burnett, District Director as aforesaid, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California, on the .... day of.................1932.

NOW, the condition of the above obligation is such that if the said SABURO HIGA shall prosecute his appeal to effect and answer all costs if he fails to make his plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

PUBLIC INDEMNITY COMPANY, A NEW JERSEY CORPORATION, By Samuel Silverman

[Seal]

I hereby approve the foregoing bond.

Dated the 17 day of June 1932.

Wm. P. James

Judge or Clerk.

[Endorsed]: No. 10506-J In the District Court of the United States, in and for the Southern District of California, Central Division. Cost Bond on Appeal $250.00 Dated May 17th, 1932 Public Indemnity Company. Filed Jun 17 1932 R. S. Zimmerman, Clerk by G. J. Murphy, Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of SABURO HIGA, On Habeas Corpus.	No. 10506-J. PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

TO THE CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare and duly authenticate the transcript and following portions of the record in the above entitled case for appeal of the said appellant heretofore filed with the United States Circuit Court of Appeals for the Ninth Circuit:

1. Complaint and petition for Writ of Habeas Corpus.

2. Order granting Writ of Habeas Corpus, and regarding custody of Saburo Higa pending hearing thereon.

3. Writ of Habeas Corpus.

4. Return to Writ of Habeas Corpus.

5. Order Discharging Writ of Habeas Corpus and Remanding Saburo Higa.

6. Petition for Appeal.

7. Order Allowing Appeal and Fixing Custody of Saburo Higa.

8. Assignments of Error.

9. Stipulation that Original Files and Records in the Department of Labor be sent to the Clerk of the Circuit Court as part of the Appellate Record.

10. Order for transmission of Original Exhibits.
11. Cost Bond on Appeal, and Bail Bond on Appeal.
12. Citation.
13. This Praecipe.

DATED: June 16, 1932.

J. Edw. Keating
J. Edward Keating
and
Theodore E. Bowen
Theodore E. Bowen
Attorneys for Petitioner.

[Endorsed]: No. 10506-J. In the United States District Court, in and for the Southern District of California, Central Division. In the Matter of Saburo Higa, on habeas corpus. Praecipe for Transcript of Record on Appeal. Received copy of the within Praecipe this 16 day of June, 1932. P. V. Davis, Attorney for Appellee. Filed Jun. 16, 1932, R. S. Zimmerman, Clerk, by G. J. Murphy, Deputy Clerk. J. Edward Keating and Theodore E. Bowen, attorneys at law, 1212 Chapman Building, Los Angeles, Cal. Trinity 7033 Attorneys for petitioner & appellant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of)
SABURO HIGA,)
On Habeas Corpus.)

No. 10506-J.
CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 23 pages, numbered from 1 to 23 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; petition for writ of habeas corpus; order granting writ of habeas corpus and fixing bail; writ of habeas corpus; return to writ of habeas corpus; order discharging writ of habeas corpus; petition for appeal; assignment of errors; order allowing appeal; stipulation regarding original records; order for transmission of original records; bail bond; cost bond and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to............and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this............ day of July in the year of Our Lord One Thousand Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-seventh.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 6892.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of

SABURO HIGA,

On Habeas Corpus.

Saburo Higa,

Appellant,

vs.

A. E. Burnett, District Director, United States Immigration Service, District No. 31,

Appellee.

APPELLANT'S OPENING BRIEF.

J. Edward Keating
and
Theodore E. Bowen,
Chapman Bldg., 8th and Broadway, Los Angeles,
Attorneys for Appellant.

FILED
NOV
PAUL P. O'BRIEN,

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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No. 6892.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

In the Matter of

SABURO HIGA.

On Habeas Corpus.

Saburo Higa,

Appellant,

vs.

A. E. Burnett, District Director, United States Immigration Service, District No. 31,

Appellee.

OPENING BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from an order discharging a writ of habeas corpus and remanding Saburo Higa to the custody of the United States Immigration Service [Transcript of Record, p. 11].

The original records of the Department of Labor have been filed with the clerk of this court pursuant to an order of the District Court [Transcript of Record, p. 17].

Throughout this brief we will refer to those records as "Immigration File". The printed transcript of the proceedings in the District Court will be referred to as "Transcript of Record".

Saburo Higa is an alien, subject of Japan, who has been ordered deported from this country by the Secretary of Labor on the sole ground that he has remained longer in the United States than permitted by the Immigration Act of 1924, in that he has failed to maintain the status of a student.

. The facts in the case are in the main undisputed. Saburo Higa's father had apparently lived in Hawaii for a long period of time. When Saburo Higa was fourteen years old, he left Japan and went to Hawaii to join his father. He was duly and regularly admitted to Hawaii on May 30, 1918, having in his possession a Japanese passport and visa by an American consul. He then started to go to school in Hawaii and completed high school there.

In 1927, he received a permit from the United States Immigration Service at Honolulu to proceed to the mainland to become a student at the University of Washington. He was admitted to the mainland at Victoria on September 15, 1927. He entered the University of Washington that same month and remained there for three years. At the end of the 1930 term, he decided to stay out one year to rest and to earn money to enable him to complete his course. He was in good standing at the school at that time, and testified that he intended to reenter in the fall of 1931. Before he had a chance to reenter, deportation proceedings were instituted against

him on the charge that he had failed to maintain his status as a student. At the conclusion of the hearing he was ordered deported to Japan.

After he had been ordered deported, he filed a petition for a writ of habeas corpus, alleging in substance that there was no evidence to show that he had ever abandoned his status as a student, or to sustain the warrant of deportation [Transcript of Record, pp. 3 to 5]. The writ, by order of the District Court [Transcript of Record, p. 6], was issued and served [Transcript of Record, pp. 7 and 8]. Return was duly made [Transcript of Record, pp. 8 and 9]. The evidence adduced at the hearing on the writ consisted of the records of the United States Immigration Service now on file with the clerk of this court. Thereafter, the District Court made its order discharging the writ and remanding Saburo Higa to the custody of the Immigration Service [Transcript of Record, p. 11]. From that order this appeal is presented.

SPECIFICATIONS OF ERROR RELIED UPON.

Specifications of error relied upon by appellant are as follows:

Specification 1. The court erred in holding and deciding that Saburo Higa should be deported to Japan for failing to maintain his exempt status of a student in the United States. This is Assignments of Error 1, 2, 3, 4, 5 and 6.

Specification 2. The court erred in holding and deciding that Saburo Higa was not a *bona fide* student and entitled to remain in the United States as such. This is Assignment of Error No. 7.

ARGUMENT.

At the outset it should be noted that Saburo Higa was duly and regularly admitted to the United States at Honolulu, Territory of Hawaii, on May 30, 1918, for permanent residence. This is conceded. He was permitted, in 1927, to go to the mainland for the purpose of attending the University of Washington.

It is our first contention that there is nothing in the Immigration Act of 1924, or in any other Immigration Act, requiring an alien, who has been lawfully admitted to the United States at the Territory of Hawaii and later allowed to go to the mainland as a student, to return to Hawaii or to Japan after he has completed his studies. We challenge respondent to cite any authority giving the Immigration Service the right to effect deportation in such a case.

The only section of the Immigration Act of 1924 referring to students is section 4, subdivision (e) (8 U. S. C. 204), which reads as follows:

> "An immigrant who is a *bona fide* student at least fifteen years of age and who seeks to enter the United States solely for the purpose of study at an accredited school, college, academy, seminary, or university, particularly designated by him and approved by the Secretary of Labor, which shall have agreed to report to the Secretary of Labor the termination of attendance of each immigrant student, and if any such institution of learning fails to make such reports promptly the approval shall be withdrawn."

It should be noted that the term used in section 4 (e) is "United States" and not "Continental United States".

The only section referring to the deportation of an alien for failing to maintain his exempt status as a student is section 15 (8 U. S. C. 215), which reads as follows:

> "The admission to the United States of an alien excepted from the class of immigrants by clause (2), (3), (4), (5), or (6) of section 3, or declared to be a non-quota immigrant by subdivision (e) of section 4, shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clause (2), (3), (4), or (6) of section 3, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States."

It should be noted that this section only applies to aliens who are admitted to the "United States". That section, like section 3, does not say "Continental United States". It is apparent that Congress in the Immigration Act of 1924 did not intend to require aliens who had previously been lawfully admitted to Hawaii and later admitted to the United States as students to return to Hawaii or to their native country at the expiration of their studies.

Section 28 (a) of the Immigration Act of 1924 (8 U. S. C. 224) defines "United States" as follows:

> "(a) The term 'United States,' when used in a geographical sense, means the States, the Territories of Alaska and Hawaii, the District of Columbia, Porto Rico, and the Virgin Islands; and the term 'Continental United States' means the States and the District of Columbia."

Thus, section 4 (e) and section 15 have no application whatever to any alien traveling between Hawaii and continental United States.

There being no restriction in the law requiring an alien domiciled in Hawaii to depart from continental United States when he was allowed to go there for the purpose of studying, the deportation order is null and void. In any event, Saburo Higa, having been lawfully and legally domiciled in Hawaii for so many years, should be deported to that place rather than to Japan. *Darabi v. Northrup* (C. C. A. 6th, 1931), 54 Fed. (2d) 70.

While, strictly speaking, it is not necessary to a decision in this case, it may be well to point out that nowhere in the statutes of the United States is there any restriction on an alien admitted to Hawaii from coming to "Continental United States" and taking up his residence there. The Immigration Service seems to be laboring under the impression that the Presidential Proclamation of March 14, 1907, is still in force and effect. The Proclamation of March 14, 1907, was promulgated by President Roosevelt, and it is a matter of common knowledge that such proclamation was distasteful to the Japanese Government, which government vigorously protested. This protest resulted in the so-called "Gentlemen's Agreement". After this so-called "Gentlemen's Agreement" was entered into, the Proclamation of March 17, 1907, was entirely superseded and modified by the Proclamation of President Taft, issued February 24, 1913, which is the only executive order now in force on the subject matter of aliens admitted to various territories of the United States and

their free passage to other portions of the nation. *Akira Ono v. U. S.* (C. C. A. 9th, 1920), 267 Fed. 359.

While the Proclamation of 1907 expressly mentioned Hawaii as one of the places from which laborers with limited passports could not be admitted, it is important that in the Proclamation of 1913 no mention of Hawaii is made. Presumably the mention of Hawaii was left out for the reason that the President was fully aware that any restriction on the free movement of legally domiciled aliens from incorporated territories of the United States to and from the states would be illegal and unconstitutional. In any event, the Proclamation of February 24, 1913, by its very language only applies to aliens coming into the continental territory of the United States from the foreign country issuing him his passport, or from an insular possession of the United States, or from the Canal Zone. The language of the proclamation is as follows:

> "It is made the duty of the President to refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States *from such country, or from such insular possession, or from the Canal Zone.*" (Italics ours.)

Manifestly, Saburo Higa did not enter continental United States from Japan or from an insular possession or from the Canal Zone. He entered from an integral part of the United States, to-wit, an incorporated territory.

The territory held by the United States not included within the states themselves in the main falls within three classifications:

(a) Incorporated territory, such as Hawaii and Alaska;

(b) Possessions, such as the Philippines;

(c) Territories, possessed by the United States but not, strictly speaking, owned, such as the Canal Zone.

Pursuant to a joint resolution (30 Statutes at Large 750), Hawaii was annexed to the United States on August 12, 1898. At that time, it was merely a possession of the United States although within its jurisdiction. However, under the Act of June 14, 1900 (31 Statutes at Large 141; 48 U. S. C. 491, *et seq.*), Hawaii was formally incorporated as a territory of the United States. *Hawaii v. Mankichi,* 190 U. S. 197; 47 L. Ed. 1016. At that time, the Constitution and laws of the United States were formally extended to Hawaii. (48 U. S. C. 495). All persons who were citizens of Hawaii were declared to be citizens of the United States. (48 U. S. C. 494 and 8 U. S. C. 4.) Of course, between 1898 and 1900, Hawaii had the status merely of an insular possession. During that time immigration could be restricted from Hawaii to the United States. But from and after 1900, Hawaii was as much an integral part of this nation as any of the states. It bears the same relation to the rest of the country as the District of Columbia and Alaska do, and as Arizona and New Mexico did before their admission into the Union. Hawaii, at the present time, being an incorporated territory, is qualified to become a state as and when Congress may choose to admit it. The distinction between incorporated territories and insular possessions is brought out in the cases of *De Lima v. Bidwell,*

182 U. S. 1; 45 L. Ed. 1041; and *Downes v. Bidwell*, 182 U. S. 244; 45 L. Ed. 1088.

Thus, it would be unconstitutional for either Congress or the President to restrict the free passage of aliens lawfully domiciled in Hawaii, an integral part of the United States, to another portion of the United States, for the same reason that it would be unconstitutional to restrict free passage of aliens from California to Nevada, as not being within the powers given the executive or legislative branches of this government by the Constitution.

If Saburo Higa's entry to the mainland was prohibited by the Presidential Proclamation (which it was not), then he was prohibited from coming here for any purpose, either as a student or otherwise, as we find no express provision in any of the laws for the admission of aliens domiciled in Hawaii to the mainland as students. Having been admitted to the mainland, his designation as a student is mere surplusage and should be disregarded.

The case of *Sugimoto v. Nagle* (C. C. A. 9th, 1930), 38 Fed. (2d) 207, will undoubtedly be cited by respondent in support of their contentions that immigration can be and is restricted between Hawaii and continental United States. However, a perusal of that case will indicate that the alien there involved did not on his last trip come from Hawaii, but came from Japan, although at one time he had been domiciled in Hawaii. In other words, he came squarely within the Presidential Proclamation of 1913 as he came last from his own country and not from Hawaii.

But even if we should concede for instance (which we do not) that students entering continental United States from Hawaii must return to their native land upon terminating their status as students, still in the case at bar,

an examination of the evidence in the Immigration File will establish that Saburo Higa was still a *bona fide* student at the time deportation proceedings were instituted against him. He came to Hawaii at the age of fourteen years, went to school there, and completed high school. Then he came to the United States and entered the University of Washington for a full four-year course. He had completed three years of his work, when he decided to stay out one year for a rest and to earn sufficient money to enable him to complete his course. At that time, the Registrar of the University of Washington furnished a certificate which is part of the Immigration File, certifying that he was entitled to junior standing in the University. Higa himself testified that he intended to reenter the school in October 1931. His intention in this regard was borne out by the stipulation that Virginia Titus, a high school teacher, would so testify if she were called.

The only sensible course to pursue in this regard, would have been for the Immigration Service to wait until October, 1931, only a few months, and see if he did reenter the University. We respectfully submit that if they had waited that period of time, they would have found that he did reenter and was a student. There is nothing in the Immigration Act requiring that a student continually engage in his studies. Many students of the highest calibre are required to work their way through school and to make sufficient money on the side to assist them.

U. S. ex rel Antonini v. Curran (C. C. A. 2nd, 1926), 15 Fed. (2d) 266;

Low Cho Oy v. Nagle (C. C. A. 9th, 1927), 16 Fed. (2d) 1002.

In *U. S. ex rel Antonini v. Curran, supra,* the court says, at page 267:

> "(2) Subdivision D of rule 9 of the Immigration Rules promulgated by the Department of Labor under the provisions of the Immigration Act, that a nonquota immigrant student 'who engages in any business or occupation for profit, or who labors for hire, shall be deemed to have abandoned his status as an immigrant student, and shall on the warrant of the Secretary of Labor be taken into custody and deported,' must be construed as applying to those who definitely give up their studies, and instead engage in business or work for profit or hire, but not to students, otherwise *bona fide*, who during their studies gain their maintenance and tuition by self-supporting labor."

CONCLUSION.

In conclusion, Sabulo Higa cannot be deported to Japan for the following reasons:

(1) Because he was lawfully admitted to the United States for permanent residence, not as a student, at Hawaii on May 30, 1918.

(2) Because there is no requirement in the law that a student admitted to the mainland from Hawaii must maintain his status as such.

(3) Because there is no restriction on the free passage of lawfully domiciled aliens from Hawaii to continental United States.

Respectfully submitted,

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and
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